OPINION OF ADVOCATE GENERAL VAN GERVEN
delivered on 29 June 1993 *

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Mr President,
Members of the Court,

1. The case before the Court is an appeal brought by the Commission under Article 49 of the Statute of the Court of Justice of the EEC against the judgment of 27 February 1992 of the Court of First Instance in the PVC cases (hereinafter referred to as 'the PVC judgment' [1]). In that judgment the Court of First Instance declared that the measure notified to the respondents before this court, Commission Decision 89/190/EEC of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.865, PVC) (hereinafter referred to as 'the Decision' [2]), was non-existent. The Commission claims that the Court should set aside the PVC judgment, with all the necessary legal consequences of such annulment and in particular refer the cases back to the Court of First Instance for a decision on the other issues raised by the applicants but not dealt with by the PVC judgment.

I shall divide up my arguments as follows. First, I shall discuss the objection raised by the respondents to the effect that the appeal is inadmissible as being out of time and, in general, the question as to the inadmissibility of the appeal on account of new facts raised by the Commission. Next I shall consider the complaints raised by the Commission against the PVC judgment and the arguments developed by the respondents. The complaints relate to (i) the assessment by the Court of First Instance of the changes made to the Decision, (ii) the conditions laid down in the EEC Treaty with regard to the adoption of measures by the Commission, more specifically with regard to the adoption of authentic language versions of a decision, (iii) the purpose and interpretation of Article 12 of the Commission's Rules of Procedure, and (iv) the application of the theory of non-existent administrative acts. Before that, I shall briefly set out the background to the proceedings.

I — Background to the proceedings

2. As a result of investigations which it carried out on undertakings in the polypropylene sector in October 1983 pursuant to Article 14 of Council Regulation No 17 of 6 February 1962, [3] the Commission opened a file concerning polyvinylchloride (PVC). It undertook various investigations at the premises of the undertakings concerned and sent them several requests for information. On 24 March 1988 the Commission instituted a proceeding under Article 3(1) of Regulation No 17 against fourteen PVC

1 — Judgment in Joined Cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others* v *Commission* [1992] ECR II-315.

2 — OJ 1989 L 74, p. 1.

3 — Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the EEC Treaty, OJ, English Special Edition 1959-1962, p. 87.

producers. [4] By letter of 5 April 1988, the Commission gave the parties the opportunity of being heard on the matters to which the Commission took objection. [5] On 1 December 1988 the Advisory Committee on Restrictive Practices and Dominant Positions delivered its opinion on the Commission's draft decision. Following this, the Commission adopted the Decision. It officially bears the date of 21 December 1988 and was notified to the parties concerned in February 1989. The text of the Decision is authentic in Dutch, English, French, German and Italian.

In the Decision, the fourteen PVC producers were found to have infringed Article 85(1) of the EEC Treaty by participating (for the periods identified in the Decision) in an agreement and/or concerted practices originating in about August 1980. It was alleged that under that agreement and/or concerted practice the producers supplying PVC in the Community took part in regular meetings in order to fix target prices and target quotas, to plan concerted initiatives to raise price levels and to monitor the operation of the said collusive arrangements (Article 1). Secondly, the Decision ordered the undertakings to bring the said infringement to an end forthwith and to refrain from the practices in question in the future (Article 2), and imposed an individual fine on each of the fourteen producers (Article 3).

3. Virtually all the undertakings concerned [6] brought actions before the Court of Justice, which, on 15 November 1989, referred the cases to the Court of First Instance. [7] They all claimed primarily that the Decision should be annulled and, in the alternative, that the Court should cancel or reduce the fines imposed by Article 3 of the Decision. [8]

Reference may be made to the Report for the Hearing for the reasoning of the Court of First Instance in the PVC judgment. It is sufficient for present purposes to state that the Court of First Instance decided to declare the Commission's Decision non-existent in law, on the ground that (i) there had been 'a manifest breach of the principle of the inalterability of the measure adopted', [9] (ii) the Member of the Commission responsible for matters of competition, who signed the measure, lacked the competence *ratione materiae* and *ratione temporis* to do so, [10] and (iii) the measure in question was not authenticated.

4 — Namely Atochem SA, BASF AG, NV DSM and DSM Kunststoffen BV, Enichem SpA, Hoechst AG, Hüls AG, Imperial Chemical Industries PLC, NV Limburgse Vinyl Maatschappij, Montedison SpA, Norsk Hydro AS, Société Artésienne de Vinyle SA, Solvay et Cie, Shell International Chemical Company Ltd and Wacker Chemie GmbH.

5 — In accordance with Article 19(1) of Regulation No 17 and Commission Regulation No 99/63/EEC of 25 July 1963 on hearings provided for in Article 19(1) and (2) of Council Regulation No 17, OJ, English Special Edition 1963-1964, p. 47.

6 — With the exception of Solvay et Cie.

7 — Pursuant to Article 3(1) and Article 14 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities (88/591/ECSC, EEC, Euratom), OJ 1988 L 319, p. 1, with corrigenda set out in OJ 1989 L 241, p. 4).

8 — See paragraph 9 of the PVC judgment.

9 — PVC judgment, paragraphs 32 to 50. The expression is used in paragraph 49 of the PVC judgment.

10 — PVC judgment, paragraphs 51 to 65.

II — Objection of inadmissibility on account of failure to meet time-limits

4. All the appellants, with the exception of Shell ICC and Montedison, object that the appeal is inadmissible as being out of time. They contend that, since the PVC judgment was notified to the Commission on 28 February 1992, the appeal should have been brought within a period of two months of notification, pursuant to the first paragraph of Article 49 of the Statute of the Court of Justice of the EEC, that is to say, having regard to Article 80(1)(b) of the Rules of Procedure, [11] on 28 April 1992 at the latest. The Commission lodged its appeal at the Registry of the Court only on 29 April 1992.

In addition, according to the respondents, the Commission was not entitled to rely on the decision on extension of time-limits on account of distance. [12] Article 1 of that decision provides that extension of procedural time-limits on account of distance does not apply to parties habitually resident in the Grand Duchy of Luxembourg. Pending a final decision on the seat of the institutions, their provisional place of work must be taken as their habitual residence. Since the Commission performs a considerable proportion of its day-to-day work in Luxembourg and has a number of departments there employing a considerable number of officials, it likewise is habitually resident in that country.

5. I cannot share that view. It is true that, as the Court has consistently held, 'the strict interpretation of Community rules on procedural time-limits serves the requirement of legal certainty and the need to avoid any discrimination or arbitrary treatment in the administration of justice'. [13] The Court also treats the question of the habitual residence of a party to proceedings — for the purposes of the application of procedural time-limits on account of distance — as a question of fact: as long ago as the judgments in the *Fonzi* cases the Court held that 'The extension on account of distance is dependent solely on the facts, that is to say, on where the applicant has his place of residence'. [14] However, in the case of legal persons or institutions it is usual to take as the criterion for determining the place of habitual residence the place where they have their registered office or *seat*. The Court has expressly held as regards the time-limit for a company's bringing an action against a decision addressed to it that time starts to run as from the date of notification to the registered

11 — Rules of Procedure of the Court of Justice of the European Communities of 19 June 1991, OJ 1991 L 176, p. 7.

12 — Decision of 19 June 1991 of the Court of Justice on Extension of Time-Limits on Account of Distance, taken pursuant to Article 81(2) of the Rules of Procedure and set out in Annex II to the Rules of Procedure published in OJ 1991 L 176, p. 32.

13 — See in particular the judgments in Case 209/83 *Valsabbia* v *Commission* [1984] ECR 3089, paragraph 14, Case 42/85 *Cockerill-Sambre* v *Commission* [1985] ECR 3749, paragraph 10, Case 152/85 *Misset* v *Council* [1987] ECR 223, paragraph 11, and Case 276/85 *Cladakis* v *Commission* [1987] ECR 495, paragraph 11; and the order in Case C-59/91 *France* v *Commission*[1992] ECR I-525, paragraph 8.

14 — Judgments of 15 December 1966 in Case 28/65 *Fonzi* v *Commission* [1966] ECR 477, at 491, and in Case 31/65, of the same name, [1966] ECR 513, at 519. The Court held in those cases that, since at the date from which the period allowed for lodging an appeal began to run, and for the whole of that time the applicant was employed in Brussels, his habitual place of residence was Belgium.

office of the company in question. [15] The determining factor for the purposes of calculating the procedural time-limit to which an institution such as the Commission is entitled is therefore — and this is how the word 'seat' is to be understood — the place from which that institution is actually run, that is to say where the most important decisions concerning the institution's activity are made and from which that activity is set in motion. [16]

6. It cannot be denied that this nerve centre is, as far as the Commission is concerned, located in Brussels. Admittedly, at the time when the Commission brought the appeal the seat of the Community institutions had not yet been definitively fixed [17] and the Decision of 8 April 1965 of the Representatives of the Governments of the Member States on the provisional location of certain institutions and departments of the Communities [18] was still in force. However, to my mind it cannot be inferred from that decision that the Commission has its 'habitual residence' in Luxembourg. Articles 7, 8 and 9 of that decision merely list a number of Commission departments which are to be based in Luxembourg. For the rest, Article 12 of the decision provides that it does not affect 'the provisional places of work of the institutions and departments of the European Communities', which, according to Article 1, are Luxembourg, Brussels and Strasbourg. Although it is not expressly stated in the decision, it is sufficiently known that the Commission *as a decision-making body* already had its place of establishment at Brussels under the provisional arrangements [19] and the establishment of a number of its *departments* in Luxembourg was to be compensation for the Grand Duchy for the transfer, under the Merger Treaty, [20] of the High Authority of the ECSC (which was previously in Luxembourg) to Brussels. [21] In any event, that arrangement was definitively confirmed by the Decision of 12 December 1992 taken by common agreement between the Representatives of the Governments of the Member States on the location of the seats of the institutions and of certain bodies and departments of the European Communities. [22] According to Article 1(c) of

15 — Judgment in *Cockerill-Sambre* v *Commission*, cited in footnote 13, paragraph 11. See also (*inter alia*) in more implicit terms the judgment in Joined Cases 220 and 221/78 *A. L. A. and A. L. F. E. R.* v *Commission* [1979] ECR 1693 and the judgment in *Valsabbia* v *Commission*, also cited in footnote 13. As long ago as 10 December 1957, the Court held that as a result of the delivery of a letter from the High Authority to an employee of the undertaking at the address where it had its registered office, that letter had arrived within the control of the undertaking concerned: judgment in Case 8/56 *ALMA* v *High Authority* [1957 and 1958] ECR 95, at 98 and 99.

16 — Cf. the definition of the expression 'real head office' in the Opinion of Advocate General Darmon in Case 81/87 *The Queen* v *Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust PLC* [1988] ECR 5500, paragraph 5.

17 — Under Article 77 of the ECSC Treaty, Article 216 of the EEC Treaty and Article 189 of the EAEC Treaty, the seat of the institutions of the Communities is to be determined by common accord of the Governments of the Member States. The Court repeatedly held that that obligation had failed to be fulfilled: see the judgments in Case 230/81 *Luxembourg* v *Parliament* [1983] ECR 255, paragraph 36, in Joined Cases 358/85 and 51/86 *France* v *Parliament* [1988] ECR 4821, paragraph 29, and in Joined Cases C-213/88 and C-39/89 *Luxembourg* v *Parliament* [1991] ECR I-5643, paragraph 52.

18 — OJ 1967 L 152, p. 18.

19 — The Court, too, has observed this, albeit in passing: see the judgment in Case 230/81 *Luxembourg* v *Parliament*, cited in footnote 17, where it is mentioned that 'when the Councils and Commissions provided for by the [ECSC, EEC and EAEC] Treaties were established in Brussels ...' (paragraph 3).

20 — Treaty of 8 April 1965 establishing a Single Council and Single Commission of the European Communities, OJ 1967 No 152, p. 2.

21 — Cf. Article 37 of the Merger Treaty, on the basis of which the Member States took the decision of 8 April 1965. See *inter alia* M. Schweitzer, 'Artikel 216', in Grabitz *Kommentar zum EWG-Vertrag*, Munich, Beck, p. 1, No 3; see also for the history of the provisional places of work of the institutions since the declaration of 7 January 1958 of the Ministers of Foreign Affairs of the original Six, G.-E. zur Hausen, 'Artikel 216', in Groeben-Thiesing-Ehlermann, *Kommentar zum EWG-Vertrag*, IV, Baden-Baden, Nomos, 1991, pp. 5462-5464; J.-L. Dewost, 'Article 216', in *Le droit de la Communauté économique européenne (Commentaire Mégret)*, XV, Brussels, Editions de l'Université Libre de Bruxelles, 1987, p. 267 et seq.

22 — OJ 1992 C 341, p. 1. The text of the decision is also published in Bull. EC, 12-92, p. 25.

that decision, the Commission is to have its seat in Brussels and the departments listed in the above-mentioned provisions of the 1965 decision are to be established in Luxembourg.

7. I conclude from the foregoing that, even under the provisional arrangements, the Commission has its habitual residence in Brussels for the purposes of the application of the Court's procedural time-limits and that it therefore, under Article 1 of the Decision on extension of time-limits on account of distance, is entitled to a two-day extension. As a result, its appeal was lodged in time and the objection of inadmissibility on account of failure to meet time-limits fails.

III — Objection of inadmissibility on account of new facts raised by the Commission

8. Most of the respondents also contend that the appeal is inadmissible on the ground that the Commission sets out therein a new statement of facts, with which the judgment of the Court of First Instance was not concerned. Since appeals before the Court of Justice are confined to points of law, the Commission should have confined itself to stating all the essential facts as set out in the judgment at first instance. However, it is claimed that the Commission omitted certain essential findings of the Court of First Instance, set forth some new matters and left out of account the majority of the findings resulting from the preparatory inquiries undertaken at first instance. In addition, it is claimed that in its appeal the Commission presents some essential aspects of the procedure before the Court of First Instance incorrectly.

9. In this respect it is sufficient for me to observe that the Court of First Instance has the last word when it comes to findings of fact. [23] Since the review carried out by the Court of Justice in appeals against judgments of the Court of First Instance is confined to *points of law* (Article 168a(1) of the EEC Treaty and Article 51 of the Statute of the Court of Justice of the EEC), the Court of Justice cannot rule on new facts which have been raised. That would necessitate a fresh assessment of the facts, which, as the Court of Justice has consistently held, is precluded:

'The appeal can be based only on pleas claiming infringement of rules of law, to the exclusion of any assessment of the facts, and is therefore admissible only in so far as it is claimed in the appeal that the decision of the

23 — Cf. R. Joliet and W. Vogel, 'Le tribunal de première instance des Communautés européennes', *Revue du Marché commun*, 1989, (423), p. 430.

Court of First Instance disregarded rules of law which it had to ensure were respected.' (Unofficial translation) [24]

My starting point, therefore, is that in assessing the complaints set out by the Commission in its appeal — and the respondents' arguments likewise [25] — the findings of fact of the Court of First Instance only can be taken into account. Legally, therefore, the description of the factual background to the PVC case set out in the Commission's appeal has no probative value and can be regarded only as a unilateral declaration. Consequently I do not have to consider that description more closely.

In contrast, I would stress forthwith that where the Commission in the part of its appeal concerning the law contests the grounds of the PVC judgment *in so far as* a legal inference made therein is connected with facts which the Court of First Instance has not duly established, an *infringement of the law* is invoked which must be declared in principle an admissible complaint. The plea 'infringement of Community law', on which, under Article 51 of the Statute of the Court of Justice of the EEC, an appeal can be based, has a broad meaning: [26] according to the judgment in *Vidrányi* 's case, it includes not only the written rules of Community law but also the (unwritten) general principles which form part of the Community legal order. In that judgment, the Court accepted as a plea in law on appeal the infringement of the general principle of compliance with the rights of the defence and of the obligation for courts to give reasons for their decisions. [27] Drawing legal inferences from facts which have not been established or have not been duly established undoubtedly constitutes an infringement of the duty to state reasons, hence a complaint to that effect relates to an infringement of Community law and must therefore in principle be accepted by the Court as admissible. [28] I shall assess when discussing the relevant point (section 24 below) whether the pleas raised by the Commission to which the

24 — Judgment in Case C-346/90 P *F.* v *Commission* [1992] ECR I-2691, paragraph 7; judgment in Case C-283/90 P *Vidrányi* v *Commission* [1991] I-4339, paragraphs 12 and 13; judgment in Case C-132/90 P *Schwedler* v *Parliament* [1991] ECR I-5745, paragraph 10; see also the earlier order in Case C-115/90 P *Turner* v *Commission* [1991] ECR I-1423, especially paragraph 13. In other words, an appeal whose pleas are confined to contesting a purely factual assessment of the Court of First Instance which itself is not based on any rule of law is inadmissible: see, expressly, the judgment in *Schwedler* v *Parliament*, cited above, at paragraph 10. For further confirmation, see the judgment in Case C-107/90 P *Hochbaum* v *Commission* [1992] ECR I-157, paragraphs 9 and 16, the judgment in Case C-378/90 P *Pitrone* v *Commission* [1992] ECR I-2375, paragraphs 12 and 13, and the judgment in *F.*v *Commission*, cited above, more specifically at paragraphs 10, 14 and 18.

25 — Accordingly, the changes made to a particular language version of the Decision which were mentioned by a number of respondents (in particular, BASF AG, Hoechst AG and Société artésienne de vinyle) in their reply but not expressly established by the Court of First Instance in the PVC judgment cannot be considered.

26 — The broad wording of Article 51 of the Statute of the Court of Justice of the EEC as regards the ground of appeal 'infringement of Community law' can only confirm this. See in this connection *inter alia* H. Schermers and D. Waelbroeck, *Judicial Protection in the European Communities*, Deventer, Kluwer Law & Taxation, 1992, p. 515, § 893: 'By its wide formulation, it prevents all doubt about whether all aspects of Community law can be controlled by the Court of Justice'.

27 — Judgment in *Vidrányi* v *Commission*, cited in footnote 24, at paragraphs 19 and 29 respectively.

28 — See in that connection my Opinion in *Costacurta* v *Commission* [1991] ECR I-5459, paragraph 3, where reference is made to the relevant experience of supreme courts in the Member States.

objection of inadmissibility relates satisfy those requirements.

IV — The assessment by the Court of First Instance of the changes made to the Decision

10. The Commission's first plea for setting aside the PVC judgment claims error in law and defect of reasoning as regards the assessment by the Court of First Instance of the changes made to the Decision between the time when the meeting of the full Commission adopted it and the time when it was notified to the addressees. The Commission's complaints relate to (i) the changes made to the German version of the Decision and (ii) the amendment made to all the language versions, namely the addition of a paragraph to point 27 of the Decision and the change made to the operative part of the Decision.

In order to understand the purport of the plea and the following discussion properly, it is appropriate first to quote paragraph 35 of the PVC judgment. That paragraph sets out the ground on which the Court of First Instance's analysis of the changes made to the Decision is based. On the basis of the judgment of the Court of Justice in Case 131/86 *United Kingdom* v *Council* [29] — which I shall be discussing further in sections 13 and 14 — the Court of First Instance set forth the following considerations:

'The principle that a measure may not be altered once it has been adopted by the competent authority constitutes an essential factor contributing to legal certainty and stability of legal situations in the Community legal order both for Community institutions and for persons whose legal or factual situation is affected by a decision adopted by those institutions. Only rigorous and absolute observance of that principle can guarantee that, subsequent to its adoption, a measure may be amended only in accordance with the rules on competence and procedure and, consequently, that the notified or published measure constitutes an exact copy of the measure adopted, thus reflecting faithfully the intention of the competent authority.'

A. The changes made to the German version of the Decision

1. The judgment of the Court of First Instance and the views of the parties

11. The Commission claims that the Court of First Instance erred in law in holding (i) that it was not necessary to consider whether the changes made to the German version were substantial and (ii) that those changes affected the lawfulness of the Decision as a whole in relation to all the applicants. I shall

29 — Case 131/86 *United Kingdom* v *Council* [1988] ECR 905.

begin with the first point, but would initially call to mind the relevant passage of the PVC judgment.

The Court made the finding that the German version of the decision adopted by the full Commission at its meeting on 21 Decision 1998 exhibited 'significant differences' compared to the English and French versions, on the one hand, — those three versions were all adopted at the meeting — and compared to the German version notified and published in the Official Journal on 17 March 1989, on the other hand, which 'could not be regarded as mere corrections to spelling or grammar'. [30] After listing the relevant differences (see section 14 below), the Court of First Instance held as follows in paragraph 42:

'Since those changes were made after the adoption of the measure on 21 December 1988 and do not merely relate to spelling or grammar, they must have been made by a person who was not empowered to do so and are therefore contrary to the principle that the measure adopted by the Commission may not be altered, there being no need to consider the scope, importance or substantial nature of those changes, as is apparent from the judgment of the Court of Justice in *United Kingdom* v *Council*, *supra*.'

30 — PVC judgment, paragraph 40.

12. The Commission considers that, in its reading of the judgment in *United Kingdom* v *Council*, the Court of First Instance applied an erroneous interpretation of Article 190 of the EEC Treaty, the provision on which that judgment is based. According to that article'[r]egulations, directives and decisions of the Council and of the Commission shall state the reasons on which they are based and shall refer to the proposals or opinions which were required to be obtained pursuant to this Treaty'. The Commission argues that, for there to be an infringement of Article 190, it must be proved that the changes made to the measure after its adoption are of a *substantial* nature. However, in the case at issue the changes consisted simply of linguistic improvements which affected neither the prerogatives of Members of the Commission nor, *a fortiori*, the rights of the addressees of the Decision. Finally, the Commission argues that it must retain the faculty of correcting a language version, even an authentic text, to bring it exactly into line with the version on which the measure is based.

For their part, the respondents argue that the differences between the version submitted to the full Commission and the German version notified go far beyond mere spelling and grammatical corrections, the only kind which, according to the judgment in *United Kingdom* v *Council*, may be accepted after the adoption of the measure. The distinction made by the Commission between substantial and non-substantial changes is not supported by the case-law and cannot be established by reference to objective criteria.

2. The judgment in Case 131/86 *United Kingdom* v *Council*

13. This brings me to a closer analysis of the judgment in *United Kingdom* v *Council*. In that case the Court was asked by the United Kingdom to annul Council Directive 86/113/EEC of 25 March 1986 laying down minimum standards for the protection of laying hens kept in battery cages. [31] The second plea was that the text of the directive differed *in its preamble* in three respects from the draft which had been submitted to the Council for adoption. The Court held that that plea was well founded and based its reasoning on the Council's Rules of Procedure and on Article 190 of the EEC Treaty. After recapitulating the relevant provisions of the Council's Rules of Procedure, the Court held — and I cite *in extenso*— as follows:

'However, the Council's Rules of Procedure do not authorize the Secretary-General or the staff of the General Secretariat to make alterations or corrections to texts adopted by the Council. Although it is clearly part of the duties of the Council's General Secretariat to correct spelling and grammar, that discretion cannot extend to the content of the measure in question.

(...) the alterations made by the Council's General Secretariat concern only the statement of the reasons on which the directive is based and do not affect the body of the measure itself. However, that statement of reasons was prepared pursuant to Article 190 of the Treaty, which requires that regulations, directives and decisions of the Council and the Commission should contain a statement of the reasons which led the institution to adopt them, so as to make possible a review by the Court and so that the Member States and the nationals concerned may be aware of the conditions under which the Community institutions have applied the Treaty (see the judgment of 7 July 1981 in Case 158/80 *Rewe* v *Hauptzollamt Kiel* [1981] ECR 1805).

It follows that the statement of reasons is an essential part of a measure. Consequently, neither the Secretary-General of the Council nor the staff of its General Secretariat has the power to alter the statement of reasons for a measure adopted by the Council.' [32]

Since it was established that the alterations made to the directive went far beyond simple corrections of spelling and grammar, the Court declared the directive void. [33]

3. Differences between the present case and Case 131/86

14. It appears to me that the Court of First Instance dealt rather lightly with some substantial points of difference between the circumstances at issue in *United Kingdom* v *Council* and the circumstances of the present case (see later in this section), *together with* the question (see sections 15, 16 and 17 below) as to what, in thelight of the case-law

31 — OJ 1986 L 95, p. 45.

32 — Judgment in *United Kingdom* v *Council*, paragraphs 35, 36 and 37.

33 — Judgment in *United Kingdom* v *Council*, paragraphs 38 and 39 and paragraph 1 of the operative part.

of the Court of Justice on Article 190 of the EEC Treaty, is the precise test to be applied in order to assess whether or not particular changes made to an individual decision in a competition case after it has been officially adopted are unlawful.

As far as the first point is concerned, namely the considerable points of difference with regard to the circumstances, the two cases are different first of all in respect of the *nature* of the changes found. To my mind, it follows that it certainly cannot be inferred from *United Kingdom* v *Council* that 'the scope, importance or substantial nature' of the changes can remain undiscussed. In contrast, in that judgment the Court of Justice drew a distinction between *changes in the content* of a measure, including the statement of reasons, and *corrections of a purely linguistic nature*. [34] The changes in the preamble which the Court had to consider in that case clearly fell into the first category: they concerned in particular the legal basis of the directive at issue (an added reference was made in the preamble to an article of the Treaty) and the deletion of a whole recital in the preamble. [35] Although the changes to the German version of the Decision which are mentioned by the Court of First Instance were not merely corrections of 'spelling and grammar' within the meaning of the judgment in *United Kingdom* v *Council*, I consider that neither do they alter the *content*, that is to say the purport, of the statement of reasons of the Decision. The changes were manifestly made only in order to bring the German version of the Decision into line with the English and French versions (the amendments mentioned in the first and second indents of paragraph 41 of the judgment of the Court of First Instance [36]) or to remove a clerical error originating in the English version (change mentioned in the third indent [37]). The changes are, in any event, so minor and limited in coverage as to have no impact at all on the legal assessment of the infringement of Article 85 of the EEC Treaty or on the right of the addressees of the Decision to the fullest possible legal protection (see section 17 below).

A second major difference between the judgment in *United Kingdom* v *Council* and the present case, at least as regards this part of the first plea, is that only *changes in one*

34 — See in particular paragraph 35 of the judgment in *United Kingdom* v *Council*.

35 — See paragraph 33 of the judgment in *United Kingdom* v *Council*.

36 — The changes referred to in the *first indent* of paragraph 41 concern two minor additions to point 7 of the German version of the notified and published version of the Decision compared with the German version of the draft Decision (dated 14 December 1988): (i) the addition of footnote 2, which reads 'In any case both Hüls and Hoechst are identified by ICI and BASF as participants in the meetings'; and (ii) the addition to the main text of the sentence in brackets 'Hoechst, the only other possibility, was only a minor producer of PVC'. The change referred to in the *second indent* is even more limited: it relates to the replacement of the phrase 'Die Unternehmen streiten offensichtlich nicht ab' ('the undertakings *apparently* do not deny') by 'Die Unternehmen bestreiten zwar nicht' ('the undertakings *admittedly* do not deny').

37 — This indent refers to the change made to the first paragraph of point 41 of the Decision. It consists in the omission of a word, namely 'Rationalisierungsprozess' ('rationalization') from the notified and published German version as follows (I quote the text of the draft decision): 'Die europäische Petrochemie-Industrie einschliesslich des PVC-Sektors hat in dem von dieser Entscheidung erfassten Zeitraum einen grundlegenden Umstrukturierungs- und Rationalisierungsprozess durchlaufen, der von der Kommission unterstützt worden ist' ('Over the period covered by the present decision the Western European petro-chemical industry — including the PVC sector — has undergone a substantial restructuring and rationalization process, which has received the support of the Commission.')

language version, the German, are involved, whilst in *United Kingdom* v *Council* changes were found to have been made in all the language versions. This seems to confirm that, as the Commission argues, the changes in the German version of the Decision were intended chiefly to render that version identical to the other language versions.

Finally, I would refer to a last — to my mind, essential — difference between the situation in *United Kingdom* v *Council* and the present case. In the former case, a *Member State*, which sits *as a member* of the Community institution concerned, the Council (see Article 2 of the Merger Treaty), rightly considered that its rights had been impaired on the ground that, after the directive at issue had been adopted by the Council, changes were made to it for which the appropriate decision-taking process had not been followed, so that it had been unable to take part in that process. The fact that the Member State concerned could rely on the rules of procedure of the Community institution of which it was a member in order to claim that the General Secretariat had no power to make alterations to an adopted text, was beyond dispute. [38] Likewise, the question whether the United Kingdom suffered any damage as a result of the infringement in question was irrelevant to the Court's assessment: as the Court observed in the same judgment, [39] the first paragraph of Article 173 of the EEC Treaty gives each Member State the right to contest the legality of a directive without making the exercise of that right conditional on proof of an interest in bringing proceedings. The situation in the present case appears completely different, since it is concerned with a Commission decision in which the Commission, under Article 3(1) of Regulation No 17, held that there had been an infringement of Article 85 of the EEC Treaty: *individuals* — who, of course, can assert no rights as members of the relevant Community institution to the correct decision-taking procedure being followed [40] — may under the second paragraph of Article 173 of the EEC Treaty contest the legality of such a decision only in so far as the decision was addressed to them or is of direct and individual concern to them. [41]

4. The requirement laid down by Article 190 of the EEC Treaty to state reasons in individual decisions in competition cases

15. This leads me to my second point of criticism. The judgment in *United Kingdom* v *Council*, in which, as I have already mentioned, a *directive* was at issue, does not provide guidance exclusively about the question whether the requirement to state reasons, as laid down in Article 190 of the EEC Treaty, has been fulfilled. More specifically it does not provide guidance in a case such as the present one concerning an *individual decision* in a competition case. In fact, in that area the Court has developed extensive case-law with regard to the requirement to state reasons, which the PVC judgment wrongly

38 — Application of the criteria developed by the Court in the judgment in Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069 also leads to this outcome; see sections 48, 53 and 54 below.

39 — Judgment in *United Kingdom* v *Council*, paragraph 6.

40 — For the impact of this on the question as to whether the Commission's Rules of Procedure may be invoked, see section 55 below.

41 — This is also consistent case-law: cf. the judgment in Case 6/68 *Zuckerfabrik Watenstedt* v *Council* [1968] ECR 409, at 415, as long ago as 11 July 1968.

ignores. This point of criticism, moreover, goes beyond the plea presently under discussion since the Court of First Instance has, in other respects, too, based its reasoning on the abovementioned interpretation of Article 190 of the EEC Treaty and of the judgment in *United Kingdom* v *Council*. [42]

16. As the Court of Justice has consistently held, the purpose of the requirement to state the reasons on which an *individual decision* is based is

'to enable the Court to review the legality of the decision and to provide the person concerned with details sufficient to allow him to ascertain whether the decision is well founded or whether it is vitiated by a defect which will allow its legality to be contested'. [43]

The statement of grounds required by Article 190 of the EEC Treaty must therefore disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question. [44] The precise extent of the duty to provide a statement of grounds depends, however, on the type of measure involved and on the circumstances in which the measure was adopted: [45] in that connection, account should be taken in particular of the context in which the decision was taken, the practicalities and the time and technical facilities available for making such a decision, [46] and the possible interest which the addressees or the other parties to whom it is of direct and individual concern within the meaning of the second paragraph of Article 173 of the EEC Treaty may have in the decision. [47]

More specifically with regard to *competition cases*, the Court has held that the requirement laid down in Article 190 to state the grounds on which a decision is based is satisfied where the Commission decision refers to the matters of fact and law on which the

42 — See in particular paragraph 47 of the PVC judgment (concerning the addition of a new paragraph to point 27 of the Decision, paragraphs 49 and 50 (concerning the change made to the operative part of the Decision), paragraph 61 (concerning the competence *ratione temporis* of the Member of the Commission responsible for competition matters), paragraph 72 (concerning the significance under Community law of authenticating measures contained in the Rules of Procedure), paragraph 96 (concerning the classification of the measure as a decision within the meaning of Article 189 of the EEC Treaty) and paragraph 98 (concerning the appearance of the measures notified and published).

43 — See most recently the judgment of 4 June 1992 in Case C-181/90 *Consorgan* v *Commission* [1992] ECR I-3557, paragraph 14; earlier cases include the judgments in Joined Cases 96 to 102, 104, 105, 108 and 110/82 *NV IAZ International Belgium and Others* v *Commission* [1983] ECR 3369, paragraph 37, in Case 8/83 *Bertoli* v *Commission* [1984] ECR 1649, paragraphs 12 and 13, in Case 32/86 *Sisma* v *Commission* [1987] ECR 1645, paragraph 8, and in Case C-358/90 *Compagnia Italiana Alcool* v *Commission* [1992] ECR I-2457, paragraph 40. An earlier formulation of that principle is to be found in the judgment in Case 16/65 *Schwarze* [1965] ECR 877, at 889.

44 — See the judgment in Case 108/81 *Amylum* v *Council* [1982] ECR 3107, paragraph 19, and the judgment in Case 185/83 *University of Groningen* [1984] ECR 3623, paragraph 38. More recently, see the judgment in Case C-350/88 *Delacre* v *Commission* [1990] ECR I-395, paragraph 15, and the judgment of 1 April 1993 in Joined Cases C-260/91 and C-261/91 *Diversinte and Iberlacta* [1993] ECR I-1885, paragraph 11.

45 — Judgment in *Consorgan* v *Commission*, paragraph 14; judgment in *Sisma* v *Commission*, paragraph 8 (cited in footnote 8). See the judgment in Case 13/72 *Netherlands* v *Commission* [1974] ECR 27, paragraph 11, and the judgment in Case 819/79 *Germany* v *Commission* [1981] ECR 21, paragraph 19. See with regard to the case-law of the Court of Justice concerning the principle that the requirement to state reasons must be assessed in the light of the nature of the measure in question: G. Le Tallec and C. D. Ehlermann, 'La motivation des actes des Communautés européennes', *Revue du Marché commun*, 1967, p. 179 et seq.; see also C. Hen, 'La motivation des actes des institutions communautaires', *Cahiers de droit européen*, 1977, (49), pp. 73 to 78.

46 — See the judgment in *Schwarze*, cited in footnote 43, at 888; cf. also the judgment in *Delacre*, paragraph 16.

47 — See, as regards the last point, the judgment in Joined Cases 296 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 19; judgment in Case 41/83 *Italy* v *Commission* [1985] ECR 873, paragraph 46.

legal justification for the measure is based. [48] The Commission does not have to discuss all the matters of fact and of law which may have been dealt with during the administrative procedure. [49] In contrast, it is enough that it *sufficiently* set out the considerations of fact and of law on which it relied in arriving at the operative part of its decision, or in other words that it provided the persons concerned with the information *necessary* to enable them to decide whether or not the decision was well founded. [50] In particular, in the case of decisions imposing a fine, the Court has held that

'the statement of reasons is to be considered sufficient if it indicates *clearly and coherently* the considerations of fact and of law on the basis of which the fine has been imposed on the parties concerned, in such a way as to acquaint both the latter and the Court with the essential factors of the Commission's reasoning'. [51]

According to the Court there is no infringement of the requirement to state reasons laid down in Article 190 where '[t]he decision, *considered as a whole*, sets out clearly and coherently the essential elements of fact and law on which it is based'. [52] Neither is there such an infringement where the Commission omitted factors from its decision which it considered, rightly or wrongly, to be irrelevant. [53] Even if certain passages were not drawn up with the accuracy to be desired, there is no infringement of essential procedural requirements within the meaning of Article 173 if that fact has prevented neither the applicants nor the Court from grasping the extent of the complaint made by the Commission and from determining whether it is well founded. [54] However, where the statement of reasons is given in too summary a manner, there will be such an infringement in particular where the Commission goes appreciably further than previous decisions. [55]

48 — See *inter alia* the judgment in *IAZ* v *Commission*, cited in footnote 43, at paragraph 37; judgment in Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 14; judgment in Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 22; judgment in Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie* v *Commission* [1985] ECR 3831, paragraph 88; judgment in Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 72; judgment in Case 246/86 *Belasco* v *Commission* [1989] ECR 2117, paragraph 55. This case-law has been expressly taken over by the Court of First Instance: see in particular the judgment in Case T-44/90 *La Cinq* v *Commission* [1992] II-1, paragraphs 41 and 42; the polypropylene judgments of 10 March 1993, including the judgments in Case T-10/89 *Hoechst* v *Commission* [1992] II-629, paragraph 312, and in Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraph 319; judgment in Case T-66/89 *Publishers Association* v *Commission* [1992] ECR II-1995, paragraph 75.

49 — Judgment in Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck* v *Commission* [1980] ECR 3125, paragraph 66; judgment in *Michelin* v *Commission*, paragraph 14; judgment in *VBVB and VBBB* v *Commission*, paragraph 22; judgment in Case 86/82 *Hasselblad* v *Commission* [1984] ECR 883, paragraph 17; judgment in *Stichting Sigarettenindustrie*, paragraph 88; judgment in *BAT and Reynolds* v *Commission*, paragraph 72; judgment in *Belasco* v *Commission*, paragraph 55. As long ago as the judgment in *Consten and Grundig* v *Commission* the Court held that the Commission had not infringed the rights of the defence on the ground that 'in non-judicial proceedings of this kind the administration is not required to give reasons for its rejection of the parties' submissions': Joined Cases 56 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, at 338.

50 — See, expressly, the judgment in *VBVB and VBBB* v *Commission*, paragraph 22; and the judgment in Case 42/84 *Remia* v *Commission* [1985] ECR 2545, paragraphs 26 and 27.

51 — Judgment in Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 78 (emphasis added). In the judgment in the *Cimenteries* case, the Court employed the criterion of the decision's being 'sufficiently clear': judgment in Joined Cases 8 to 11/66 *Cimenteries* v *Commission* [1967] ECR 75, at 94.

52 — Judgment in Case 55/69 *Cassella* v *Commission* [1972] ECR 887, paragraph 22 (my emphasis).

53 — Judgment in *ACF Chemiefarma* v *Commission*, paragraph 80.

54 — Judgment in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 118.

55 — Judgment in Case 73/74 *Papiers Peints* v *Commission* [1975] ECR 1491, in particular paragraphs 31 and 34; judgment in *BAT and Reynolds* v *Commission*, paragraph 71; judgment in *Delacre* v *Commission*, paragraph 15.

17. In my view, the following guiding principles can be derived from that case-law of the Court with regard to the significance of Article 190 of the EEC Treaty in competition cases. The requirement to state grounds laid down in that provision is not of an absolute but of a relative nature, in the sense that it is intended to enable the *addressees* of a decision *to know and to defend their rights as well as possible.* [56] They must therefore be informed in a sufficiently clear and coherent way of the main points of the Commission's reasoning, that is to say, with regard to the considerations of fact and of law which are necessary in order for them to appreciate the well-foundedness of the decision taken against them.

Secondly, the statement of reasons must put the Court in a position to carry out the *review of legality* with which it is charged by Article 173 of the EEC Treaty in proceedings brought by the addressees of a decision in a competition case. That principle, too, serves the need to provide the addressees of the measure concerned with the fullest possible legal protection.

If, however, the shortcomings complained of by the parties are not of such a kind as to affect the legal situation of the undertakings concerned, [57] or, in other words, to affect their right to the fullest possible legal protection, an infringement of Article 190 of the EEC Treaty is not involved.

5. The aforementioned case-law seen in relation to the contested changes

18. More specifically as regards the question at issue, namely the status under Article 190 of the EEC Treaty of (limited) changes made between the time when a decision in a competition case was adopted and the time when it was notified and published, I consider that the judgments in particular in the *Suiker Unie* and *Hasselblad* cases are relevant. [58]

In the *Suiker Unie* case, one of the parties relied on a mistake which occurred only in the French version of the decision notified to the parties, namely 1969/70 was stated as being the year in which the infringement of the competition rules commenced rather than 1968/69. The Court ruled against that party, which sought to abide by the French text notified to it: the notification of objections indicated clearly the marketing year from which the Commission intended to find that the applicant had engaged in the relevant concerted practice and it also appeared from the pleadings that the party in question had plainly understood the decision in that sense. In those circumstances, the Court decided that the decision had to be

56 — In that connection it has been rightly observed that the requirement to state reasons is an inevitable corollary of the right to bring legal proceedings, in the sense that it enables that right to be exercised under the best possible conditions: see F. Schockweiler, 'La motivation des décisions individuelles en droit communautaire et en droit national', *Cah. Dr. Eur.*, 1989, (3), p. 33.

57 — See the judgment in *Consten and Grundig* [1966] ECR 299, at 339.

58 — For the references of those cases see footnotes 54 and 49 respectively.

interpreted as finding that there had been an infringement of competition law from 1968/69 onwards. [59]

In the *Hasselblad* case, the point at issue was an error in all the language versions of the notified and published text of a decision in indicating the clauses of a dealer agreement which was found to conflict with Article 85(1) of the EEC Treaty. One of the contested clauses occurred only in a later, amended version of the dealer agreement, whilst two other clauses were numbered differently in the original version of the agreement. Nevertheless the Court considered that this was not an insuperable barrier and held that the decision had to be deemed to refer to the clauses intended (but wrongly indicated) by the Commission:

'If in that respect a clerical error was made in the decision, that error cannot have had any material effect on the applicant's understanding of the Commission's objections.' [60]

19. The judgments in the *Suiker Unie* and *Hasselblad* cases strengthen me in the conclusion which I arrived at earlier (in section 17), namely that, in assessing whether the requirement laid down in Article 190 of the EEC Treaty to state reasons is satisfied, the Court is guided in the first place by the question as to whether the addressees of the decision were sufficiently, that is to say, sufficiently clearly and coherently, apprised of the complaints made against them. In both those cases that condition was fulfilled. If the Court could reach the conclusion that isolated discrepancies between the various language versions of the *notified version* of a decision or, as the case may be, clerical errors in *all* the language versions of the notified text were not such as to call in question the validity of the relevant decision on the ground that they did not have any material effect on the understanding of the Commission's objections, I cannot see how it can be decided, on the basis of Article 190 of the EEC Treaty, that a decision containing limited linguistic or minor substantive corrections in the German version which were made *before the decision was notified to the parties*, that is to say before the parties could officially have become apprised of the Commission's decision, is unlawful. [61] In so far as a problem does arise in that regard, it arises exclusively in connection with the *powers* of the person who made the relevant changes (see section 44 below).

59 — Judgment in *Suiker Unie*, paragraphs 227 to 232.

60 — Judgment in *Hasselblad* v *Commission*, paragraph 40.

61 — I therefore consider that the parallel drawn with Article 66(1) of the Court's Rules of Procedure by Hüls AG in its written observations is completely misconceived. That provision empowers the Court, within two weeks after the delivery of a judgment, to 'rectify clerical mistakes, errors in calculation and obvious slips in it'. That power to effect corrections, however, concerns the period after the judgment has been delivered in open court and after each of the parties has been served with a certified copy (see Article 64 of the Rules of Procedure); in contrast, in this case the corrections were made to a decision before it was notified to the parties.

20. In the light of the foregoing, I can take the following view of the Commission's first complaint. In so far as it paid no attention to the 'the scope, importance or substantial nature' of the changes made to the Decision after its adoption, the Court of First Instance, to my mind, gave too absolute an interpretation to the judgment in *United Kingdom* v *Council*. It appears from the case-law of the Court of Justice on the requirement to state reasons as laid down in Article 190 of the EEC Treaty with regard to decisions in competition matters, that the test for ascertaining whether that requirement has been fulfilled is not so much whether such changes go further than corrections to 'grammar or spelling', but whether they materially affected the respondents' understanding of the Commission's complaints and thereby impaired their right to the fullest possible legal protection. Contrary to the respondents' view, that test seems to me to be completely objective and sufficiently manageable to permit effective judicial review. Since the Court of First Instance did not apply that test, Community law has been infringed.

6. Alternatively: has the legality of the Decision as a whole been affected in relation to all the addressees?

21. In view of the decision which I have reached above, strictly speaking I do not need to consider the second infringement of the law raised by the Commission, namely the question whether the changes made to the German version of the Decision were capable of affecting the entire Decision in relation to all the addressees. However, in the alternative, in case the Court, contrary to what I have argued above, should decide to regard the contested changes as constituting an infringement of Article 190 of the EEC Treaty, I shall consider this argument.

In that connection, it should first be stated that, as the respondents have observed, the Court of First Instance did not say in so many words that the legality of a decision is affected as a whole by changes made in a particular language version after its adoption by the meeting of the full Commission. Yet, in my view, this appears to be necessarily implied by paragraph 42 of the PVC judgment, more specifically in the following clause: '[the changes] are therefore contrary to the principle that the measure adopted by the Commission may not be altered'. It is even plainer if that passage is read in conjunction with paragraph 49 of the PVC judgment, in which the Court of First Instance held that 'amendments made to the statement of reasons for a decision constitute, as the Court of Justice has held, a defect of such a nature as to affect the legality of the amended decision *in its entirety* because they undermine the effectiveness of Article 190 of the Treaty ...'. [62] The starting point must therefore be that the Court of First Instance did associate the relevant changes in the German version of the Decision with the invalidity of the entire Decision, that is to say, in all the other language versions and in relation to all the other addressees.

62 — My emphasis.

I take the view that that conclusion is manifestly disproportionate. To my mind, the infringement of Article 190 (assuming there is one) can affect the validity of only the *authentic German version* of the Decision. According to the fourth paragraph of Article 189 of the EEC Treaty, one of the essential characteristics of a decision is that it is an individual legal measure. [63] A decision is intended to apply a general rule (in this case Article 85 of the EEC Treaty) in a specific case: therefore it will be binding only on the persons to whom it is expressly addressed and, by virtue of Article 3 of Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community, [64] only in the language of the Member State under whose jurisdiction the addressee comes. Defects in statements of reasons occurring in only one language version of a decision therefore affect only the legal position of the addressees to whom that language applies.

Contrary to what Hüls AG, Société artésienne de vinyle (hereinafter referred to as 'SAV') and Shell ICC argue, that position cannot be altered by the fact that, in this case, the Commission adopted only one decision, albeit in various authentic versions.

Indeed, in the judgment in *Suiker Unie* the Court held as follows:

'There is no reason at all why the Commission should not make a single decision covering several infringements, even if some of the undertakings to which it is addressed are unconnected with some of these infringements, *provided that the decision permits each addressee to obtain a clear picture of the complaints made against it*'. [65]

Changes in the German version of a decision affect in no respect whatsoever the ability of addressees to whom the decision is notified in another authentic language, namely theirs, to obtain a clear picture of the complaints made against them. Changes made in one authentic language therefore have no effect on the legality of the decision in the other authentic languages.

Consequently, I consider that there has been an infringement of Community law in respect of this point in so far as a disproportionate sanction was imposed.

63 — The criterion for the distinction between decisions and regulations is precisely whether or not the measure in question is of general application, that is to say whether or not it is addressed to a limited number of persons: see the judgment in Joined Cases 16 and 17/62 *Producteurs de Fruits* v *Council* [1962] ECR 471, at 478, as long ago as 14 December 1962.

64 — OJ, English Special Edition 1952-1958, p. 59, as most recently amended by Section XVII of Annex I to the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the treaties (OJ 1985 L 302, p. 242). That article provides as follows: 'Documents which an institution ... sends to a Member State or to a person subject to the jurisdiction of a Member State shall be drafted in the language of such State'.

65 — Judgment in *Suiker Unie*, paragraph 111, my emphasis.

B. The changes made to all the language versions of the Decision

1. The judgment of the Court of First Instance and the views of the parties

22. In addition to the changes made in the German version of the Decision, the Court of First Instance found, in the context of the measures of investigation which it ordered, two changes made to *all the language versions* of the Decision between the time when it was adopted by the full Commission and the time when it was notified: (i) the incorporation of a completely new fourth paragraph in point 27 of the Decision (see section 27 below for its wording) and (ii) the omission from Article 1 of the operative part of the words '(EMC Group)' after the name of the undertaking SAV.

The Commission contests the Court of First Instance's assessment of the two changes, in each case by two pleas, which I may summarize as follows. As regards the *first change*, it argues that the Court of First Instance (i) erred in point of reasoning, in considering that the paragraph added in all the language versions to point 27 of the Decision was not approved by the full Commission and that the substantial nature of the changes made was undeniable; (ii) erred in law, in holding that it was unnecessary to consider whether the paragraph in question was substantial in nature; and (iii) erred in law by stating that its inclusion affected the legality of the Decision in its entirety. As far as the *second change* is concerned, the Commission claims that the Court of First Instance was mistaken (i) in point of reasoning, in holding that the deletion of the addition '(EMC Group)' was of a kind to alter the scope of the Decision and (ii) in point of law, in holding that that omission affected the legality of the Decision in its entirety and in relation to all the applicants.

2. Objection of inadmissibility on account of new facts raised?

23. Before I consider all those complaints, I must examine the objection of inadmissibility raised by most of the respondents in so far as the Commission raises new facts therein which were not dealt with by the Court of First Instance. It is claimed that, notably in paragraphs 5 and 38 of its appeal, the Commission has raised new facts, in particular with regard to the discussions at the special meeting of the Chefs de Cabinet held in the morning of 19 December 1988, to that which the Chefs de Cabinet decided that day at their ordinary weekly meeting to recommend to the Commission and to that which the full Commission discussed at its meeting on 21 December 1988.

24. As I mentioned earlier (in section 9), the Court of Justice is in principle bound by findings of fact made by the Court of First Instance. Consequently, the Court of Justice cannot be influenced by new factual data adduced by the parties. In fact, in paragraphs 5 and 38 of its appeal the Commission mentions three factual particulars not found by the Court of First Instance in its

judgment which it may therefore not rely on before the Court of Justice:

— In paragraph 5 it quotes the conclusion of the minutes of the *special* meeting of the Chefs de Cabinet held in the morning of 19 December 1988 from which, it is claimed, it appears that it was agreed to propose, following a suggestion from the Cabinet of the Member of the Commission responsible for competition, that a paragraph be added to point 27 of the draft decision, the French and English versions of which were set out in Annex III to those minutes. However, that conclusion does not appear in that part of those minutes (a document bearing the number SEC (88) 2033), which was produced by the Commission at the hearing on 21 November 1991. [66]

— Still in paragraph 5 of its appeal, the Commission states that at their *ordinary* meeting, held in the afternoon of 19 December 1988, the Chefs de Cabinet recommended the Commission to adopt the proposal from the Member of the Commission responsible for competition matters on the terms set out in the minutes of the special meeting held that morning. However, the Court of First Instance did not make such a finding of fact in its judgment.

— Lastly, the Commission states in paragraph 38 of its appeal that, at its 945th meeting, held on 21 December 1988, the full Commission, after 'some discussion of general matters such as the level of the fines ... fully endorsed the recommendations of the Chefs de Cabinet'. This is not confirmed by the findings of fact made by the Court of First Instance either. On the contrary, the Court of First Instance considered that, in view of the wording of the minutes of the relevant meeting of the full Commission held on 21 December 1988, it is merely established that the Commission took note of the examination of the matter by the Chefs de Cabinet of the Members of the Commission at their special meeting and weekly meeting on 19 December 1988 (but see section 25 below). [67]

In so far as the Commission's argument is based on those factual data it must be declared inadmissible. In concrete terms, in my view, the inadmissibility means only that the Court of Justice, in assessing the complaint set out by the Commission in paragraph 38 of its appeal — which I have referred to in section 22 concerning the first change under (i) —, should leave those newly raised facts out of account. However, this does not mean that the *whole* of the

66 — A somewhat unhappy reference is made to that document in the third indent of paragraph 26 of the PVC judgment: as I have mentioned, the number of that document is SEC (88) 2033, and not, as the Court of First Instance states, 'SEC (88) OJ 945, point 15'. Although the title, as mentioned by the Court of First Instance, is 'Note for the attention of Members of the Commission', the document clearly indicates — but this is not stated by the Court of First Instance — that it is the'Minutes of the special meeting of the Chefs de Cabinet held on 19 December 1988', which refers to document No C (88) 2497 (that is to say, the draft decision in English, French and German).

67 — PVC judgment, paragraph 37. See in this connection also the following footnote.

complaint is inadmissible: the aim of the (whole of the) complaint is essentially that the Court of First Instance did not fulfil its duty to state reasons in so far as it concluded that the paragraph in question was not approved by the full Commission *on the ground* of inadequate findings of fact. To that extent, the complaint must be declared admissible and considered (see section 9 above).

3. Consideration of the complaints in connection with the addition of a new paragraph

25. According to the Commission, the Court of First Instance failed to fulfil the duty to state reasons by failing to make sufficient findings of fact with a view to its decision that the newly added paragraph (see section 27 below for its wording) was not approved by the full Commission. If the complaint is understood to that effect, closer appraisal shows, in my view, that the Commission's complaint must be held to be well founded. The interpretation given by the Court of First Instance to the *minutes* of the relevant Commission meeting is an essential part of its reasoning in reaching the decision that the paragraph in question was not approved by the full Commission. On the basis of that document, the Court of First Instance held in paragraph 46 that it is merely established that the Commission took note of the examination of the case by the Chefs de Cabinet at their special meeting on 19 December 1988. [68] Moreover, in paragraph 47 the Court of First Instance held that'it is apparent from the minutes of the meeting themselves (as described above at paragraph 37) that the Commission, in adopting the drafts of 14 December 1988 which did not contain that paragraph, by implication intended not to adopt the amendment'. However, if reference is made to the *text of the minutes themselves* — and not to the summary of those minutes contained in paragraph 37 of the PVC judgment — one finds that the following is expressly stated in section 2 thereof:

'La Commission prend connaissance du résultat de l'examen de cette question par les Chefs de Cabinet lors de leur réunion spéciale (cf. doc. SEC (88) 2033, point 11) et lors de leur réunion hebdomadaire (cf. doc. SEC (88) 1958, point 16).' [The Commission took note of the results of the examination of that matter by the Chefs de Cabinet at their special meeting (cf. doc. SEC (88) 2033, point 11) and at their weekly meeting (cf. doc. SEC (88) 1958, point 16).]

I find that the way in which the Court of First Instance reproduces that point in paragraph 37 of the PVC judgment is not entirely accurate: (i) the Court does not state that the point in question *expressly* refers to the minutes of the special meeting of the Chefs de Cabinet (reference number SEC (88) 2033, which, according to the documents and declaration produced by the Commission on 21 November 1991, had appended to it Annex III containing the added paragraph [69]); and (ii) the Court merely finds that the full Commission took

68 — According to the Dutch, French, German and Italian versions of the PVC judgment. Only in the English version of the judgment is it stated in paragraphs 37 and 46 that the Commission'took note of the *results* of the examination'. I therefore assume from this that the first four language versions most faithfully reproduce the point of view of the Court of First Instance.

69 — See footnote 66 above.

note of the examination of the matter by the Chefs de Cabinet, whereas the relevant section of the minutes states that the full Commission took note of the *results* of the examination by the Chefs de Cabinet at their special meeting and — contrary to the assertion by the Court of First Instance in paragraph 46 of the PVC judgment — at their ordinary meeting.

It follows in my view that the conclusion to which the Court of First Instance comes, namely that the full Commission implicitly indicated that it did *not* wish to take over the proposed addition, is based on an inaccurate description of the facts. On the contrary, it appears to me from the facts set out above that if the full Commission had not wished to take over the proposed addition — of which, in view of section 2 of the minutes, to which I referred earlier, it was manifestly aware — this would in all probability have been recorded in the minutes. In other words, it appears from the factual information that the full Commission implicitly accepted, rather than implicitly rejected, the addition suggested by the Chefs de Cabinet. That point in itself constitutes an infringement by the Court of First Instance of its duty to state reasons, since it based legal consequences on insufficiently established facts.

26. In addition in connection with the above, I also consider that the Commission's second complaint with regard to the added paragraph — see section 22 above concerning the first change under (ii) — is well founded, as I will demonstrate next. The complaint consists of the charge that the Court of First Instance was in breach of its duty to state reasons in so far as it held that the substantial nature of the contested paragraph did not have to be considered and moreover could not be denied. In contrast, according to the Commission the non-substantial nature of the paragraph is obvious: it forms part of the considerations relating to a procedural question which arose in the course of the administrative procedure under Regulation No 17 and does not form part of the reasoning constituting the necessary basis for the operative part of the Decision.

Before examining this second complaint, allow me to quote the contested passage of the PVC judgment:

'That addition to the statement of reasons for the decision, which relates neither to syntax nor grammar, therefore affects the validity of all the measures notified and of the measure published in the Official Journal of the European Communities, by virtue of the judgment of the Court of Justice in *United Kingdom* v *Council*, *supra*, and it is unnecessary to examine whether the amendment is of a substantial nature — a point which in any event is not in doubt.' [70]

27. The added paragraph reads as follows:

'It should be pointed out that any waiver by the undertakings of confidentiality for their

70 — Paragraph 47 of the PVC judgment.

internal business documents is subject to the overriding interest in ensuring that competitors are not informed of each other's commercial activities and intentions in such a way that competition between them is restricted.'

To my mind, it is clear that the principles set out above (in sections 17, 19 and 20) must also be applied to this question: the test for establishing whether changes made to a decision infringe the requirement to state reasons which is laid down in Article 190 of the EEC Treaty is whether they had a material effect on the respondents' understanding of the Commission's complaints and consequently impaired their right to the fullest possible legal protection.

In my view, in assuming that 'it is unnecessary to examine whether the amendment is of a substantial nature — a point which in any event is not in doubt'— the Court of First Instance wrongly neglected to consider whether the addition in question had had a material effect on the respondents' understanding of the criticism levelled at them with regard to the infringement of Article 85 of the EEC Treaty and, as a result, on their right to full legal protection. To my mind, however, no such material effect was present. The added paragraph is concerned with the question — described by the Court of First Instance as difficult and controversial — whether, in a case where a proceeding instituted under Article 85 concerns a number of undertakings, the Commission may accept the waiver by one of the undertakings of confidentiality for information concerning it or whether overriding considerations — such as safeguarding the Community rules on competition — prevent it from doing so. [71] In other words, the paragraph is not concerned with the reasons for the Decision in so far as they are important to the undertakings concerned from the point of view of their proper understanding of the Commission's complaints concerning agreements contrary to Article 85 of the EEC Treaty, but merely relates to a *procedural issue* (as appears, moreover, from its location within the Decision in the part headed 'Procedural issues'), namely whether the Commission complied with rights of defence in the course of the administrative procedure.

On a closer reading of the whole of point 27 of the Decision — where the key question is whether the Commission infringed rights of defence of a number of the respondents by rejecting their demands for full access to its administrative files — it further becomes clear that the new paragraph has only limited significance: it merely *clarifies* why the Commission decided not to accede to the demands of the majority of the undertakings that each of them might be allowed to inspect, on the basis of reciprocal waivers of confidentiality, all the documents which the Commission had obtained from the other undertakings. Strictly speaking, the new paragraph was not even necessary for that

71 — Cf. PVC judgment, paragraph 44.

purpose, first because it is stated in the preceding paragraph that *de facto* the Commission would have no objection to the undertakings' exchanging copies of documents amongst themselves and secondly because *de jure* in the next paragraph (which appeared in full in the draft decision) the Commission justifies its refusal to divulge the contents of documents on the basis of the established case-law of the Court of Justice, such as the judgment in *VBVB and VBBB* v *Commission*. In that case, the Court held as follows:

'although regard for the rights of the defence requires that the undertaking concerned shall have been enabled to make known effectively its point of view on the documents relied upon by the Commission in making the findings on which its decision is based, *there are no provisions which require the Commission to divulge the contents of its files to the parties concerned.*' [72]

28. This leads me to reach the following conclusion. Even accepting that the full Commission did not take over the paragraph added to point 27 (see, with regard to that issue, section 25 above), the assessment made by the Court of First Instance of this amendment on the basis of the judgment in *United Kingdom* v *Council* to a large extent comes up against the same objections as I raised earlier with regard to its assessment of the changes made in the German version: seen from the point of view of Article 190 of the EEC Treaty, the test is not whether the discrepancies between the version of a decision adopted by the Commission and the version notified to the addressees relate to 'grammar or syntax', but whether the changes had a material effect on the respondents' understanding of the Commission's complaints and, consequently, had an adverse impact on their legal position in point of legal protection. By ignoring that test — and also by neglecting to consider the importance of the contested addition sufficiently in the light of that test —, the Court of First Instance failed to comply with Community law and to fulfil its duty to state reasons, respectively.

In view of the foregoing, I take the view that it is unnecessary to consider the Commission's third complaint — set out in section 22 above, first change, under (iii) —, namely that the sanction imposed by the Court of First Instance was excessive.

72 — Judgment in *VBVB and VBBB* v *Commission*, cited in footnote 48, at paragraph 25 (emphasis added). More recently, the Court confirmed this case-law in its judgment in Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 16. Moreover, the Court of First Instance takes this case-law as its starting point: see in particular the judgments in Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 52, and in Case T-9/89 *Hüls* v *Commission* [1992] ECR II-499, paragraph 47. In both those judgments, the Court of First Instance stated that in so far as the Commission had developed rules on access to files which went further than was required by the rights of the defence, and published them in its reports on competition policy, it could not deviate from the rules which it itself had laid down: judgment in Case T-7/89 *Hercules Chemicals* v *Commission*, paragraph 53; judgment in Case T-9/89 *Hüls* v *Commission*, paragraph 48; see also in this connection the judgment of the Court of First Instance in Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92 *Cimenteries CBR* v *Commission* [1992] ECR II-2667, paragraphs 40 and 41, and, very recently, the judgment in Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraph 29.

4. Examination of the complaints relating to the omission of the words '(EMC Group)' from the operative part of the Decision

29. The Commission objects that the reference in question was purely descriptive and had no legal significance. The reference, which was hardly used at all in the various phases of the procedure, was, it is claimed, deleted when the lawyer-linguists revised the Decision, in order to avoid any ambiguity. The Commission further argues that no explanation whatsoever was given by the Court of First Instance for its statement that the removal of the reference to the EMC Group may alter the manner in which the alleged infringement is attributed and even shift the financial burden of the fine imposed.

In contrast, SAV argues that the omission from the operative part of the Decision of the reference to the EMC Group — an omission which affects it particularly — may influence the manner in which the alleged infringement is attributed and shift the financial burden of the fine imposed.

30. My I briefly recapitulate what the Court of First Instance decided in this respect. After finding that the reference in question was included in the drafts submitted to the full Commission but was omitted from the version notified to the respondents and published in the Official Journal, the Court of First Instance held that such an amendment conflicts with Article 190 of the EEC Treaty:

'Amendments to the operative part of a decision directly affect the scope of the obligations which may be imposed on individuals by the amended measure or the scope of the rights which it confers upon them. In this case such an amendment may alter the manner in which the alleged infringement is attributed, and even shift the financial burden of the fine imposed.' [73]

The Court of First Instance then held that there were even stronger grounds for applying the principles laid down in *United Kingdom* v *Council*,

'where, as in this case, the amended measure imposes fines and obligations on the addressees of the measure and where the amendment in question may alter the description of the legal person upon whom the obligations are imposed. That is the necessary consequence of the amendment to Article 1 of the operative part of the decisions, in which the Commission, on the basis of the considerations set out in the statement of reasons, forms a legal definition of the facts in terms of Article 85 of the EEC Treaty and designates the undertakings guilty of infringements. Consequently, such an amendment necessarily has a direct effect on the other

73 — PVC judgment, paragraph 49.

articles of the operative part which, by issuing orders to the applicants and imposing fines on them and by determining the method by which the addressees of the measures may release themselves from their obligations, merely set out the consequences necessarily flowing from Article 1 of the operative part, the very article to which an amendment was made.' [74]

31. Could the amendment in question alter the manner in which the alleged infringement is attributed to SAV and therefore have a material effect on the respondent's understanding of the Decision and on its right to legal protection, which was taken as the decisive test above (section 17)? It follows without doubt from the case-law of the Court of Justice that where an undertaking is integrated into a group in a such a way that it loses all autonomy, the parent company must, where appropriate, bear (part) responsibility for conduct by its subsidiary which conflicts with the competition rules. Since the 'dyestuffs' case, the Court has consistently held that 'the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company' and that 'such may be the case in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company'. [75]

However, *in this case* I am by no means convinced that the reference to or the omission of the words '(EMC Group)' from Article 1 of the operative part of the Decision [76] had or could have had any effect on the imputability of the infringement found in the Decision. In the first place, it is clear that neither the draft decision nor the version notified to the addressees and published in the Official Journal contained in Articles 3 and 4 of the operative part any reference to SAV's being part of the 'EMC Group'. Furthermore, contrary to the view taken by the Court of First Instance in paragraph 50 of its judgment, I consider that the Decision is absolutely unambiguous in imposing a specific fine on SAV and only on that undertaking (Article 3) and in prescribing how the fine is to be paid (Article 4). Lastly, the preamble to the Decision refers consistently

74 — PVC judgment, paragraph 50.

75 — Judgment in Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraphs 132 and 133; judgment in Case 52/69 *Geigy* v *Commission* [1972] ECR 787, paragraph 44; see also the judgment in Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 15. In the judgment in Case 107/82 *AEG* v *Commission* [1983] ECR 3151, at paragraphs 49 and 50, the Court held, in keeping with that case-law, that a check on whether a parent company actually made use of its power of control was superfluous in the case of a wholly-owned subsidiary. See also in this connection the very recent case of the Court of First Instance which is cited in footnote 72, *BPB Industries and British Gypsum* v *Commission*, at paragraph 149.

76 — The Court of First Instance found only that that amendment was made to Article 1 of the Decision. In paragraph 43 of its appeal the Commission mentions that the reference '(EMC Group)' also occurred in Article 5 of the draft decision. As this is a finding of fact, I must leave this out of account here. For the same reason I am precluded from considering the Commission's argument (at the end of paragraph 43 of the appeal) that that reference was included in documents served on SAV.

only to SAV as such, without describing it as a subsidiary of any parent company. [77]

32. It follows from the whole of the above that, regard being had to the text of the Decision as a whole, [78] the contested amendment had, and could have had, no effect at all on the imputability of the alleged infringement to SAV or therefore on that undertaking's understanding of the Decision and its right to legal protection. In so far as it ignored that test and failed to apply it to the contested amendment, the Court of First Instance failed to comply with Community law and to fulfil its duty to state reasons, respectively.

33. This brings me to the Commission's last complaint, namely that the Court of Justice wrongly held that the omission of that reference affected the legality of the entire Decision in relation to all the respondents. I can link this to what I have said (in section 21) about the changes made in the German version: the omission of the reference '(EMC Group)' after SAV could have had no impact on the ability of the *other undertakings* to which the Decision is addressed accurately to read in the Decision what complaints were made against them, and certainly could have had no effect on the imputability of the infringement of Article 85 of the EEC Treaty with which they themselves were charged.

V — The requirements of the EEC Treaty as to the coming into being of acts of the Commission, more specifically with regard to the adoption of authentic language versions of a decision

34. The Commission takes the view that the PVC judgment is based on a manifestly excessively formalistic interpretation of the requirements of the EEC Treaty with regard to the action of the full Commission in adopting measures. It argues that the judgment is based on a legal misconception in so far as it requires the full Commission to be involved in the adoption of all the authentic language versions of its measures. The requirements of the EEC Treaty and of the Rules of Procedure as regards the action of the full Commission were, it maintains, fully complied with with respect to the adoption of the Decision.

1. The judgment of the Court of First Instance and the views of the parties

35. I shall turn to the parties' specific arguments forthwith. I would, however, first

77 — See in particular points 2, 7, 8, 9, 26 (footnote 1), 43, 48 and 54 of the Decision. In points 9, 26 (footnote 1), 43 and 48 reference is made to SAV's status as the parent company of LVM, a joint venture set up by DSM and SAV in mid-1993 in which they combined their PVC interests. Such a reference to SAV's 'downstream' affiliation has in any event nothing to do with the reference in an 'upstream' direction to the'EMC Group' with which we are concerned here. Moreover, point 43 of the Decision accurately states that SAV was responsible for its involvement in the PVC cartel only until LVM was set up and that after the formation of LVM that undertaking participated in the cartel in its own right (see as regards the last aspect also points 48 and 54 of the Decision).

78 — See the judgment in *Cassella* v *Commission*, cited in footnote 52, at paragraph 22.

state precisely what was decided on this point at first instance. The contested paragraphs are located in the part of the PVC judgment in which the Court of First Instance considers the powers of the authority which adopted the Decision and, more specifically, examines whether the Member of the Commission responsible for competition matters was empowered to adopt the Dutch and Italian versions of the Decision which were notified and published in the Official Journal. A number of applicants before the Court of First Instance claimed that the authority which adopted the Decision lacked the necessary competence on the ground that it appeared from the minutes of the 945th meeting of the full Commission that the full Commission adopted the Decision only in its English, French and German versions and authorized the Member of the Commission responsible for competition matters, at that time Mr P. Sutherland, to adopt the other official language versions, namely the Dutch and Italian. Moreover, it appears that those language versions were not submitted to the General Secretariat of the Commission until 16 January 1989, whilst Mr Sutherland's mandate expired on 5 January 1989.

In the first place, in paragraph 55 of its judgment, the Court of First Instance infers the following from Article 3 of Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community [79] read together with the first paragraph of Article 12 of the Commission's Rules of Procedure: [80]

'It follows from those provisions taken together that, where as in this case the Commission intends to adopt by a single measure a decision which is binding on a number of legal persons for whom different languages must be used, the decision must be adopted in each of the languages in which it is binding in order to avoid making authentication impossible.'

The Court of First Instance subsequently rejects the Commission's argument that the mandate conferred upon the Member of the Commission responsible for competition matters by the full Commission in order to adopt the Dutch and Italian versions of the Decision complied with Article 27 of the Rules of Procedure. [81] In its view, the adoption of a decision applying Article 85(1) of the EEC Treaty does not constitute a measure of management or administration within the meaning of Article 27 of the Rules of Procedure. [82] It is, according to the Court, 'apparent from the aforesaid first paragraph of Article 27 ..., in conjunction with the sec-

79 — See footnote 64 for the reference and content of this provision.

80 — Rules of Procedure of the Commission (63/41/EEC), OJ, English Special Edition, Second Series VII, p. 9. Since then, the Rules of Procedure have been amended in various respects, but not Article 12 thereof: see the Provisional Rules of Procedure of the Commission (67/426/EEC) (67/24/Euratom), OJ, English Special Edition, Second Series VII, p. 14; Decision of the Commission of 23 July 1975 amending the Provisional Rules of Procedure of the Commission of 6 July 1967 (75/461/Euratom, ECSC, EEC), OJ 1975 L 199, p. 43; Decision of the Commission of 6 January 1981 amending the Provisional Rules of Procedure of the Commission of 6 July 1967 (81/2/Euratom, ECSC, EEC), OJ 1981 L 8, p. 16; Decision of the Commission of 6 January 1986 amending the Provisional Rules of Procedure of the Commission of 6 July 1967 (86/61/EEC, Euratom, ECSC) OJ 1986 L 72, p. 34. For the wording of Article 12, see section 60, below.

81 — For the text of that provision see section 38, below.

82 — PVC judgment, paragraph 57.

ond paragraph thereof,' that the full Commission may delegate authority to one of its members to adopt such a decision solely in those official languages of the Community in which the text is not authentic, since the decisions adopted in those languages do not produce any legal effect and are not enforceable against one or more of the undertakings mentioned in the operative part of the decision. [83] The Court of First Instance eventually decides on the ground set out in the following paragraph of its judgment that the Member of the Commission responsible for competition matters lacked competence *ratione materiae* to adopt the Decision in Dutch and Italian:

'The effects flowing from the adoption of a decision in its authentic language version are entirely different. A decision which establishes an infringement of Article 85 of the Treaty, issues orders to a number of undertakings, imposes large fines upon them and is directly enforceable for these purposes clearly affects the rights and obligations and the property of those undertakings. It cannot be regarded merely as a measure of management or administration whose adoption falls within the powers of a single Member of the Commission since this would be directly contrary to the principle of collegiate responsibility expressly referred to in Article 27.' [84]

36. The Commission concedes that decisions taken against undertakings in relation to Article 85 et seq. of the EEC Treaty always need to be taken collectively. Where, however, such as in case of the decision at issue, the full Commission has adopted a decision the text of which is drawn up in one, two or three official Community languages, it has correctly carried out its duties. In taking a decision, a distinction has to be made between the intellectual and formal components. The intellectual element is situated at an internal stage of the decision-taking, in the formation, after examining and discussing the file, of a collective view; in contrast, the formal component consists of all the measures of execution which definitively give the measure its effect in law (drafting, translation, finalization, notification and publication). Only the first component involves the exercise of any discretionary powers and it is therefore only in that connection that action by the full Commission makes any sense. Since the translation of a decision, including the adoption of the authentic language versions, is a purely administrative executive measure, it must be possible for such steps to be taken without express specific habilitation by the full Commission, on the authority of the appropriate Member of the Commission. In that connection, the Commission further observes that the habilitation which was given to the Member of the Commission responsible for competition matters according to the minutes of the 945th meeting was not a habilitation in the strict sense of Article 27 of the Rules of Procedure: it was not even an administrative or management measure but a task admitting of no room for manoeuvre and no exercise of discretion. The Commission maintains that should the Court nevertheless hold that a habilitation within themeaning of that provision was involved, the habilitation would *a fortiori* be in accordance therewith.

For their part, the respondents argue chiefly that the distinction made by the Commission

83 — PVC judgment, paragraph 58.
84 — PVC judgment, paragraph 59.

between the intellectual and formal components of a decision is completely artificial and has no basis in the EEC Treaty, the Rules of Procedure or the Court's case-law. At the hearing, they further submitted that if the Commission is right, that would preclude the authentication procedure laid down in Article 12 of the Rules of Procedure from being used for language versions which had not been submitted to the full Commission for adoption. As a result, Article 12 would lose its binding nature.

37. In the next sections I shall address the central issue here, namely whether or to what extent the Commission, after adopting a decision relating to competition matters addressed to undertakings in one or more language versions, may proceed, under Article 27 of its Rules of Procedure, to delegate the adoption of (other) authentic language versions of the decision to the Member of the Commission responsible for competition matters. I shall not now examine whether the Court of First Instance gave, in paragraph 55 of its judgment (cited in section 35 above), a correct interpretation of Article 12 of the Rules of Procedure: this will become clear from the analysis of that provision set out in the next part of my opinion.

2. The principle of collegiate responsibility and the criteria for delegation set out in the case-law of the Court of Justice

38. A short sketch of the legal background appears to me to be necessary. It is well known that the principle of collegiate responsibility underlies the Commission's decision-taking process. [85] At treaty level, that principle is reflected in the first paragraph of Article 17 of the Merger Treaty, which states that 'The Commission shall act by a majority of the number of [its] members'. [86] This is elaborated on by the Rules of Procedure, which provide, *inter alia*, that the Commission is to act collectively in accordance with the Rules of Procedure (Article 1) and that acts of the Commission are, as a general rule, to be adopted at meetings (Article 2). The Court of Justice itself appositely set out the rationale for the principle of collegiate responsibility in its judgment of 23 September 1986 in *AKZO* v *Commission*:

'The principle of collegiate responsibility thus laid down [that is to say, in Article 17 of the Merger Treaty] is founded on the equal participation of the members of the Commission in the adoption of decisions and it follows from that principle, in particular, that decisions should be the subject of a collective deliberation and that all the members

85 — With regard to that principle, see in particular J. Amphoux, 'Article 162, al. 2 — Article 16 du traité de fusion', in *Le droit de la Communauté économique européenne (Commentaire Mégret)*, IX, pp. 247-248, No 7. See for the historical background to the principle of collegiate responsibility as expressed in the design of the High Authority in the context of the ECSC, C. F. Orphüls, 'Zur ideengeschichtlichen Herkunft der Gemeinschaftsverfassung', in *Probleme des europäischen Rechts, Festschrift für Walter Hallstein*, Frankfurt, Klostermann, 1966, (387), pp. 395-396. See also, for a more personal testimony, W. Hallstein, *Die europäische Gemeinschaft*, Düsseldorf-Wenen, Econ, 1979, p. 83.

86 — The wording of this provision is virtually word-for-word that of the former first paragraph of Article 163 of the EEC Treaty. That article was repealed by Article 19 of the Merger Treaty.

of the college of Commissioners bear collective responsibility on the political level for all decisions adopted.' [87]

However, the Rules of Procedure themselves contain a number of exceptions to this collegiate method of decision-taking, in particular the so-called written procedure under Article 11 (by which the approval of the Members of the Commission is obtained by written means) and, particularly, the delegation of powers under the first paragraph of Article 27. Since its amendment in 1975 [88] that provision reads as follows:

'Subject to the principle of collegiate responsibility being respected in full the Commission may empower its members to take, in its name and subject to its control, clearly defined measures of management or administration.' [89]

39. Is the Commission entitled, in the context of and in particular on the basis of the first paragraph of Article 27 of its Rules of Procedure (quoted above), to entrust the Member of the Commission responsible for competition matters with the adoption of a decision in one or more of the authentic languages, other than the one in which the draft decision was submitted to the Commission and approved by it collegiately?

In order to answer that question I shall consult the case-law of the Court of Justice, where to my mind the aforementioned judgment of 23 September 1986 in the *AKZO* case is of decisive importance. I would mention that, before both the Court of First Instance and the Court of Justice, the Commission has relied upon that judgment in support of its view that the procedure followed in this case was consistent with the principle of collegiate responsibility. [90] The Court of First Instance was evidently not convinced thereby, since it treated the *AKZO* judgment as a precedent only as regards the possibility afforded by Article 27 of the Commission's Rules of Procedure of adopting measures of inquiry and procedure during the Commission's *preparatory* administrative phase, that is to say, measures adopted under the general powers of investigation conferred upon the Commission by Regulation No 17. [91]

87 — Judgment in Case 5/85 *Akzo Chemie* v *Commission* [1986] ECR 2585, paragraph 30.

88 — For the reference of the relevant Commission decision, see footnote 80.

89 — The remaining paragraphs of Article 27 read as follows:
'Officials may also be empowered to take such measures if this is indispensable for the Commission properly to be able to fulfil its tasks.
Unless they have been delegated to him personally powers vested in an official shall be valid for his deputy.
Powers conferred in this way may not be sub-delegated except to the extent expressly laid down in the enabling decision.
The provisions of this article shall not affect the rules concerning delegation in respect of financial matters and staff administration.'

90 — See, as regards the proceedings before the Court of First Instance, paragraph 16 of the PVC judgment.

91 — PVC judgment, paragraph 57.

40. The *AKZO* case was concerned with an action for a declaration of nullity brought by two undertakings in the AKZO Group against a decision taken by the Member of the Commission responsible for competition matters ordering those undertakings to submit to investigations pursuant to Article 14(3) of Regulation No 17. The undertakings argued, *inter alia*, that the delegation of authority under which the contested decision was adopted was not in accordance with the principle of collegiate responsibility laid down in Article 17 of the Merger Treaty.

The Court of Justice rejected that plea in strong terms. In order to assess the compatibility with the principle of collegiate responsibility of the authorization procedure as provided for in particular in Article 27 of the Commission's Rules of Procedure, it first recalled its settled case-law, according to which

'the Commission could, within certain limits and subject to certain conditions, authorize its members to adopt certain decisions in its name without the principle of collegiate responsibility which governed its functioning being impaired by such authorization'. [92]

Next, the Court explained that two considerations underlay that settled case-law:

'On the one hand, such a system of delegation of authority does not have the effect of divesting the Commission of powers by conferring on the member to whom authority is delegated powers to act in his own right. Decisions adopted under a delegation of authority are adopted in the name of the Commission, which is fully responsible for them, and may be the subject of an application for annulment under the same conditions as if they had been considered by the full Commission. Moreover, the Commission has set up machinery making it possible to reserve for the full Commission certain measures which could be adopted under a delegation of authority. Finally, it has retained the right to reconsider the decisions granting delegations of authority.

On the other hand, limited to specific categories of measures of management or administration, and thus excluding by definition decisions of principle, such a system of delegations of authority appears necessary, having regard to the considerable increase in the number of decisions which the Commission is required to adopt, to enable it to perform its duties. The need to ensure that the decision-making body is able to function corresponds to a principle inherent in all institutional systems and which is set out in particular in Article 16 of the Merger Treaty, according to which "the Commission shall adopt its rules of procedure so as to ensure that both it and its departments operate ...".' [93]

92 — Judgment in *AKZO* v *Commission*, paragraph 35. The Court referred to the judgment in *VBVB and VBBB* v *Commission*, which is cited in footnote 48, and more specifically to paragraph 14 of that judgment.

93 — Judgment in *AKZO* v *Commission*, paragraphs 36 and 37.

41. I infer the following from that passage. In the first place, it appears to me that the scope of those paragraphs of the judgment go far beyond the dispute in *AKZO*, all the more since the wording used by the Court sets out principles — and does not merely address the measures of procedure taken pursuant to Regulation No 17 which preceded the decision at issue — and only proceeded in subsequent paragraphs to apply those principles to the actual position under discussion in the *AKZO* case. [94]

Next, it seems to me that the idea underlying the Court's argument approving the Commission's delegation and authorization procedure is that the principle of collegiate responsibility must be rendered consonant with, and therefore limited by, the principle of the *proper functioning* of the decision-making body, an institutional principle which, according to the Court (and this statement too is important: see section 55 below), is the hallmark of the Commission's Rules of Procedure. In view of the increasing number of decisions having to be taken by the Commission, the Court even considers the authorization procedure to be *necessary* in the light of that principle for the due performance of the Commission's tasks, at least as far as certain categories of measures of management and administration are concerned.

Lastly, the Court develops two criteria which the authorization procedure should fulfil if it is to be compatible with the principle of collegiate responsibility. In the first place, the authorization should comply with certain *limits as regards powers*, which means (i) that the Commission may not let the power out of its hands — in other words, the delegated power may not be transformed into an actual power transferred to a Member of the Commission — in order that there may be no doubt as to 'the identity and powers of the decision-making body, namely the Commission'; [95] (ii) that the Commission must continue to bear full responsibility (an essential element of the principle of collegiate responsibility); and (iii) that it should retain the power to reserve a delegated matter to itself as the full Commission and to reconsider decisions granting delegations of authority. In the second place, actions must be able to lie against decisions taken pursuant to authorization under the same conditions as if they had been taken by the full Commission. In other words, the *legal protection* afforded to the addressees may not be affected: they may not be deprived of the opportunity of contesting the legality of the decision delegating authority or of the decision adopted under the delegation of authority. [96]

3. The various levels of decision-making powers

42. In my view, the criteria elaborated by the Court in the *AKZO* judgment are com-

94 — Namely paragraphs 38, 39 and 40 of the judgment in *AKZO* v *Commission*.

95 — The quote is from the judgment of the Court of Justice in Joined Cases 97 to 99/87 *Dow Chemical Ibérica* v *Commission* [1989] ECR 3165, at paragraph 58 *in fine*. In that paragraph the Court refers expressly to the *AKZO* judgment of 23 September 1986 in rejecting a complaint to the effect that the Member of the Commission responsible for competition matters lacked the authority to sign a decision ordering an investigation. See also section 82 below.

96 — Judgment in *AKZO* v *Commission*, paragraph 39 *in fine*.

pletely compatible with the other judgments in which the Court considered the question of the delegation of authority in relation to Community institutions. If those judgments are read together, a distinction can be drawn as regards the exercise by the Commission of its powers in the sphere of competition policy *grosso modo* between *three levels.*

In the first place, there is the exercise of power at the *political* level. This is at the heart of the policy-making power which the EEC Treaty confers on the Commission in the sphere of competition, whereby the Commission gives shape to its competition policy by means of general administrative measures or individual decisions. [97] To use the words of the test set out in the judgment in the *AKZO case*, what is involved here is'decisions of principle' which must be reserved to the full Commission. It is clear that, as the Court of First Instance emphasized in the PVC judgment [98] in common with the Commission in its appeal, the adoption of decisions against undertakings under Article 85 et seq. of the EEC Treaty belongs in this category: such decisions are subject to broad policy-making powers and powers of assessment and necessitate the Commission's taking a view on complex economic and legal situations. In that context, the principle of collegiate responsibility must be strictly adhered to, with the result that to delegate the taking of such decisions is strictly prohibited. [99]

So-called *measures of management and administration* in the narrow sense of the expression are on a second level. In competition cases, such measures include above all measures of investigation, which are measures which the Commission proceeds to take during the preparatory decision-making phase with a view to establishing the existence of practices contrary to the competition rules. There is a certain margin of discretion associated with the taking of such measures — albeit (also because of the preparatory nature of the measures in question) a limited one. This category includes, for example, decisions which the Commission may take under Article 14(3) of Regulation No 17 ordering undertakings to submit to investigations. In the *AKZO* judgment, the Court held that, in so far as the criteria set out above (in section 41) are met, the exercise of that power may be delegated to the Member

97 — Cf. the distinction which the Court made as long ago as the judgment in *Köster*, with regard to the separation of powers between the Council and the Commission in the sphere of the common agricultural policy, between *essential* and *implementing* measures: judgment in Case 25/70 *Einfuhr- und Vorratsstelle* v *Köster* [1970] ECR 1161, paragraph 6. Recently, the Court explained that the description 'essential rules' must be reserved for'provisions intended to achieve the fundamental objectives of Community policy' (unofficial translation): judgment of 27 October 1992 in Case C-240/90 *Germany* v *Commission* [1992] ECR I-5383, paragraph 37. In the judgment in the *Rey Soda* case, the Court held with regard to the Commission's implementing powers under Article 155 of the EEC Treaty that 'it follows from the context of the Treaty ... and also from practical requirements that the concept of implementation must be given a wide interpretation': judgment in Case 23/75 *Rey Soda* v *Cassa Conguaglio Zucchero* [1975] ECR 1279, paragraph 10.

98 — See PVC judgment, paragraph 57.

99 — Early on, the Court held, in the context of the ECSC, that a discretionary power conferred on a Community institution by the Treaty 'implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy' could not be delegated, since that would bring about'an actual transfer of responsibility' and would therefore constitute a breach of the balance of powers characteristic of the institutional structure of the Community which the Court regarded as a fundamental guarantee granted by the (ECSC) Treaty in particular to undertakings and associations of undertakings: judgments in Case 9/56 *Meroni* v *High Authority* [1957 and 1958] ECR 133, at 152, and in Case 10/56 *Meroni* v *High Authority* [1957 and 1958] ECR 177, at 173.

of the Commission responsible for competition matters:

'... a decision ordering an undertaking to submit to an investigation is a form of preparatory inquiry and as such, must be regarded as a straightforward measure of management ... even if the undertakings are opposed to the investigation'. [100]

Finally, there is the level of *practical execution*, including measures relating purely to internal organization. Strictly speaking, no delegation of power is involved: the measures in question are for the practical execution of decisions which have already been taken, such as the communication or transmission of decisions to the addressees and other practical implementation measures. [101] Such practical implementing measures include no discretion. A well-known example is the power conferred on the Director-General for Competition to notify objections within the meaning of Article 2 of Commission Regulation No 99/63/EEC. The Court has repeatedly endorsed the lawfulness of that practice in the light of Article 27 of the Commission's Rules of Procedure: the official in question'acted not under a delegation of powers, but merely under an authorization to sign which he had received from the Member of the Commission'. [102] Such conferral of authorization to sign, according to the Court, constitutes 'a measure relating to the internal organization of the departments of the Commission' [103] and is 'the normal method by which the Commission exercises its powers'. [104]

4. Application of the difference in levels of decision-taking to the questions at issue in this case

43. Before considering this distinction in connection with the questions at issue in this

100 — Judgment in *AKZO* v *Commission*, paragraph 38. The Court rightly added that the power conferred on the Commission by Article 14(3) of Regulation No 17 is exercised precisely and above all when the Commission expects that the undertakings will not submit voluntarily to an investigation. See for more recent confirmation the judgment in Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, paragraphs 44 and 46, and the judgment in *Dow Chemical Ibérica* v *Commission*, cited in footnote 95, at paragraph 58.

101 — As far as the latter measures are concerned, reference may be made in particular to the powers available to Commission officials, acting on its authority, under Article 14(1) of Regulation No 17 in carrying out investigations ordered by the Commission by decision taken under Article 14(3) of that regulation. In the context of the ECSC, the Court of Justice repeatedly held that the instructions by virtue of which the High Authority had checks carried out under Article 47 of the ECSC Treaty constituted 'the actual exercise of its powers and not their delegation' and accordingly that 'the procedure and publicity required for a delegation of powers [were] not here applicable': judgment in Case 18/62 *Barge* v *High Authority* [1963] ECR 259, at 276; judgment in Case 67/69 *SIMET* v *Commission* [1971] ECR 197, paragraph 7; see also the judgment in Case 30/65 *Macchiorlati Dalmas* v *High Authority* [1966] ECR 35, at 54.

102 — Judgment in Case 8/72 *Cementhandelaren* v *Commission* [1972] ECR 977, paragraph 12; judgment in *ICI* v *Commission*, cited in footnote 75, at paragraph 13; judgment in *Geigy* v *Commission*, cited in the same footnote, at paragraph 5; judgment in *Cassella* v *Commission*, cited in footnote 52, at paragraph 5.

103 — Judgment in *ICI* v *Commission*, cited in footnote 75, at paragraph 14; judgment in *Geigy* v *Commission*, cited in the same footnote, at paragraph 5; judgment in *Cassella* v *Commission*, cited in footnote 52, at paragraph 5; judgment in *Cementhandelaren* v *Commission*, cited in the preceding footnote, at paragraph 13.

104 — Judgment in *VBVB and VBBB* v *Commission*, cited in footnote 48, at paragraph 14, where reference is made to judgments cited in the last footnote: *ICI* v *Commission*, paragraphs 11 to 15, and *Cementhandelaren* v *Commission*, paragraphs 10 to 14. See also, albeit not in connection with competition law, the judgment in Case C-200/89 *Funoc* [1990] ECR I-3369, paragraph 14, which also refers to the two judgments mentioned above. For the judgment in *Funoc* see section 52 below.

case, I would like to make the following remark concerning the *use of languages in the internal functioning* of a Community institution such as the Commission. In common with all the Community institutions, the Commission works officially in all official languages of the Community. [105] This does not, however, prevent it from using one or more Community languages as its official working language, provided that in its external action it fully complies with the principle of the equality before the law of all official Community languages, as laid down in Regulation No 1. [106] The choice of such working language or languages may, in the terms of the judgment in *AKZO* (see section 41 above), appear necessary for the proper functioning of the Commission as a body with decision-taking power, that is to say, for the purposes of effective deliberation and decision-making. In that respect, I consider that the full Commission may, in competition cases, too, take a decision on the basis of a draft decision drawn up in one or more of the Commission's working languages: what is important is that, in the light of the principle of collegiate responsibility, all Members of the Commission should be in a position to participate, on the basis of a language of which they have a command, in the discussion and decision-making (see section 38 above). [107]

The respondents' argument that providing a draft decision in *all* authentic language versions to the full Commission constitutes a guarantee for the purposes of supervising those versions (since at least one Member of the Commission whose mother tongue is one of those languages concerned can check the relevant language version) cannot be taken seriously: Members of the Commission act at the level of deliberation and decision-making — which, as I have already stated, can take place for practical reasons in one or more of the Commission's working languages — and not at the level of the *linguistic* supervision of a text.

44. This leads me to take the following view. The principle of collegiate responsibility is

105 — The Court applied that rule to itself in the past when the Community had only four official languages: cf. the judgment in Case 1/60 *FERAM* v *High Authority* [1960] ECR 165, at 170. The Court held in that case that 'like all the institutions of the three Communities, the Court is cognizant of four languages by an irrebuttable presumption of law'.

106 — See, as regards compliance with this equality of languages in the (early) case-law of the Court, O. Riese, 'Das Sprachenproblem in der Praxis des Gerichtshofs der europäischen Gemeinschaften', in *Vom Deutschen zum europäischen Recht, Festschrift für Hans Dölle*, II, Tübingen, Mohr, 1963, p. 507 et seq. As regards the specific problems to which the multilingual nature of Community legislation gives rise in the Court's case-law, see P. Brasselmann, 'Übernationales Recht und Mehrsprachigkeit. Linguistische Überlegungen zu Sprachproblemen im EuGH-Urteilen', *Europarecht*, 1992, p. 55 et seq.

107 — In this connection, I would observe that the Commission's Rules of Procedure does not contain a provision similar to Article 8 of the Council's Rules of Procedure (Rules of Procedure adopted by the Council on 24 July 1979 on the basis of Article 5 of the Treaty of 8 April 1965 establishing a single Council and a single Commission of the European Communities (79/868/ECSC, EEC, Euratom), OJ 1979 L 268, p. 1), which was raised by the respondents in their arguments at the hearing. That article provides that, except as otherwise decided unanimously by the Council on grounds of urgency, the Council is to deliberate and take decisions only on the basis of documents and drafts drawn up in the languages specified in the rules in force governing languages. In my view, the difference between the two sets of rules of procedure in this regard only confirms the view taken in the main body of this Opinion: as has already been mentioned (cf. section 14), the Council, unlike the Commission, consists of *representatives of the Member States* delegated by the national governments and hence it is normal that they should be able to participate in deliberations and decision-making in their own languages. I would also point out that in the judgment in *Nakajima* (which I shall be discussing later, in section 49), the Court held that that provision of the Council's Rules of Procedure could not be relied upon by third parties.

fulfilled where the full Commission, on the basis of one or more (working-)language versions actually deliberated and decided to take a decision finding an infringement of Article 85 of the EEC Treaty and imposing the related sanctions. That this actually happened in this case is disputed by none of the parties and appears moreover from the findings of fact made by the Court of First Instance. [108]

Contrary to the view taken by the Court of First Instance, I consider that authority given to the Member of the Commission responsible for competition matters to adopt the *text* of a decision which was adopted by the full Commission (in one or more working languages) *in the other language versions (whether or not authentic)* must be regarded as being a measure of practical execution or of internal organization: essentially, only authority is granted to carry out practical executive measures, namely the preparation of a translation, and, where necessary, coordination with the other language versions, of a decision which has already been taken.

In any event, even if, regard being had to the authentic nature of (some of) the language versions to be adopted, it were to be assumed that the authorization given by the full Commission to the Member responsible for competition matters according to the minutes of its 945th meeting was a measure of administration or management in the narrow sense of the expression, I consider that the Commission was entitled to give that authorization. On close inspection, the requirements laid down in that respect in the *AKZO* judgment were fulfilled. Thus, in the first place, as regards the *limits to authority* which have to be complied with, it is clear that, as a result of the authorization, the Commission did not divest itself of the power to take a decision of principle or abdicate its collegiate responsibility for the decision: from reading the minutes it is clear that the Commission itself first adopted the Decision in a working language (actually in several working languages, namely English, French and German) and then asked the Member of the Commission responsible for competition matters to transpose the *text* of the Decision into the other official languages. Consequently, the authorization cannot reasonably be construed as the grant of authority to adopt a new decision, but only as the conferral of authority to arrange, *on the Commission's behalf*, for the Decision to be transposed into the other (authentic and non-authentic) language versions *in accordance with* the version of the Decision adopted in English, French and German. In addition, the *legal protection* of the undertakings to which the Decision was addressed in the relevant authentic language versions was in no way affected: they were entitled to bring an action for annulment — as they in fact did — under completely the same conditions as if the Decision in the language versions concerned had been adopted by the full Commission itself. Besides, according to the PVC judgment, none of the respondents towhom the Decision was addressed in

108 — See PVC judgment, paragraph 37.

Dutch or Italian made any submission on this point at first instance. [109]

45. I therefore conclude that the Court of First Instance infringed Community law by holding that the full Commission was not entitled to authorize the Member of the Commission responsible for competition matters to adopt the text of the Decision in the other authentic language versions, namely Dutch and Italian. I would emphasize, however, that the foregoing assessment of the appraisal made by the Court of First of the lack of competence *ratione materiae* of the Member of the Commission responsible for competition matters is completely distinct from the question of the competence *ratione temporis* of the Member in question, Mr Sutherland, to *notify* the Decision to the addressees. On the basis of the finding of fact made by the Court of First Instance to the effect that the Decision both in the five authentic languages and in the four other official Community languages was not definitively prepared — that is to say, translated and revised by the lawyer-linguists — until *the end of January* 1989, it cannot be denied that Mr Sutherland, whose mandate expired on *5 January* 1989, was not empowered any more to notify the Decision to the addressees in his name but on behalf of the Commission. It is plain that that notification should have been effected by Mr Sutherland's successor. I shall examine in the last part of my Opinion whether this shortcoming is such as to affect the legality or even the existence of the Decision.

109 — Only Wacker Chemie GmbH and Hoechst AG gathered from the Commission's defence that the Decision was not adopted in Dutch and Italian on 21 December 1988, as in their view it should have been: PVC judgment, paragraph 14.

VI — Purpose and interpretation of Article 12 of the Commission's Rules of Procedure with regard to the authentication of decisions

46. According to the Commission, the PVC judgment is marked by excessive formalism and by a misapprehension in regard to the meaning and scope of the authentication of decisions under Article 12 of the Commission's Rules of Procedure. The formalities laid down by Articles 10 (relating to the approval of the minutes of Commission meetings) and 12 of the Rules of Procedure (concerning the authentication of decisions adopted by the Commission) [110] serve merely to provide a record for the Commission and, as such, have merely internal effects. According to the Commission, they are not essential to the adoption and existence of such acts and, even less, do they render measures enforceable or ensure that they are fully incorporated into Community law. In contrast, a measure enters the external legal order of the institution only by coming into force or by becoming applicable to those to whom it is addressed, that is, by its publication or notification in accordance with Article 191 of the EEC Treaty.

110 — For the text of the two provisions, see section 60 below.

47. There are, in my view, two closely related key legal questions involved here, namely (i) what legal significance is to be ascribed to the authentication of Commission decisions under Article 12 of the Commission's Rules of Procedure and (ii) may third parties invoke a failure to comply with that provision. In order to deal with these questions properly, I shall first consider the case-law which the Court of Justice has developed more generally with regard to the legal status and invocability of the rules of procedure of a Community institution or body.

A. Status and invocability of rules of procedure according to the case-law of the Court

1. Treaty provisions and precedents in the case-law

48. All the Community institutions, with the exception of the Court of Justice and the Court of First Instance (which have rules of court — known in English also as 'Rules of Procedure' [111]), have rules of procedure, which they had to establish by virtue of the EEC Treaty or the Merger Treaty. [112] As far as the Commission is concerned, the duty arises under Article 16 of the Merger Treaty, which provides as follows:

'The Commission shall adopt its rules of procedure so as to ensure that both it and its departments operate in accordance with the provisions of the Treaties establishing the European Coal and Steel Community, the European Economic Community, and of this Treaty. It shall ensure that these rules are published.'

Consequently, Article 16 of the Merger Treaty confers a power on the Commission to organize itself. [113] This institutional autonomy, which, according to the judgment in the *AKZO* case, reflects a 'principle inherent in all institutional systems' (section 39 above) is however — unlike in the case of the other institutions [114] — expressly stated as being subject to the Commission and its departments operating *in accordance with* the Community Treaties. [115]

111 — Pursuant to the third paragraph of Article 188 and Article 168a(4) of the EEC Treaty respectively.

112 — In the case of the Council, the obligation ensues from Article 5 of the Merger Treaty; in the case of the European Parliament from Article 142 of the EEC Treaty. The Economic and Social Committee is also under a duty to establish rules of procedure: see the second paragraph of Article 196 of the EEC Treaty. Under Article 9(3)(h) of the Protocol on the Statute of the European Investment Bank, the Board of Governors is to approve the Bank's Rules of Procedure.

113 — Cf. the judgment in Case 46/72 *De Greef* v *Commission* [1973] ECR 543, paragraph 14.

114 — Cf. Article 5 of the Merger Treaty (Rules of Procedure of the Council) and Article 142 of the EEC Treaty (Rules of Procedure of the European Parliament).

115 — The relevant treaty provisions are dispersed: thus it is clear that the Commission's Rules of Procedure must *inter alia* be in accordance with the requirements laid down in respect of the number of its members and their independence (Article 10 of the Merger Treaty), the principle of collegiate responsibility and the requirement as to the quorum required to be present at Commission meetings (Article 17 of the Merger Treaty), but also, for example, with the principle of collective political responsibility vis-à-vis the European Parliament (Article 144 of the EEC Treaty): cf. J. Amphoux, 'Article 162, deuxième alinéa — Article 16 du traité de fusion', in *Le droit de la Communauté économique européenne (Commentaire Mégret)*, Part 9, pp. 244-245, No 1.

49. For the rest, the Treaties do not embody express rules on the legal status of the relevant rules of procedure or on the question of their invocability. The Court of Justice has considered these aspects with reference to the Council's Rules of Procedure in its judgment of 7 May 1991 in *Nakajima* v *Council*. [116] In that judgment the Court was concerned with an anti-dumping case in which Nakajima claimed that a definitive anti-dumping regulation should be declared void. To that end, it argued *inter alia* that essential procedural requirements had been infringed, on the ground that the Council had acted in breach of two provisions of its Rules of Procedure: it alleged that the period laid down for drawing up the provisional agenda for the Council meeting had not been complied with (infringement of Article 2) and that not all the language versions of the regulation were available on the day when it was adopted (infringement of Article 8). [117] The Court rejected those arguments in strong terms:

'With regard to this point, it should be noted that the purpose of the rules of procedure of a Community institution is to organize the internal functioning of its services in the interests of good administration. The rules laid down, particularly with regard to the organization of deliberations and the adoption of decisions, have therefore as their essential purpose to ensure the smooth conduct of the procedure while fully respecting the prerogatives of each of the members of the institution.

It follows that natural or legal persons may not rely on an alleged breach of those rules since they are not intended to ensure protection for individuals.' [118]

50. There has been a lot of discussion about the value as a precedent for this case of the judgment in *Nakajima*. The Commission relied upon it already at the hearing at first instance in support of its contention that third parties are not entitled to invoke Article 12 of the Commission's Rules of Procedure. However, the Court of First Instance emphatically dismissed that approach:

'... that argument cannot be accepted. The Court considers that that judgment must be interpreted as meaning that it is necessary to distinguish between those provisions of an institution's Rules of Procedure whose infringement may not be relied upon by natural and legal persons because they are concerned solely with the internal working arrangements of the institution and cannot affect their legal situation and those whose infringement may be relied upon because, as

116 — Judgment cited in footnote 38.

117 — For the content of the latter provision, see footnote 107.

118 — Judgment in *Nakajima* v *Council*, paragraphs 49 and 50.

is the case with Article 12 of the Commission's Rules of Procedure, they create rights and are a factor contributing to legal certainty for such persons.' [119]

Before the Court of Justice the Commission again invoked the judgment in *Nakajima*. At the hearing the Commission's representative argued that, although the Court of First Instance had discussed that judgment — which was delivered after the written procedure at first instance had closed —, the judgment had not been given the attention which it deserved with regard to the questions at issue in this case.

2. The so-called 'settled case-law' of the Court of Justice concerning invocability

51. I shall later consider whether the Commission's criticism is correct. First, I would clear up another criticism voiced by the Commission at the hearing, namely that in paragraph 77 of its judgment the Court of First Instance wrongly reached the conclusion that, according to a consistent line of decisions of the Court of Justice, it is permissible for third parties to plead an infringement of the rules of procedure of a Community institution. Although the judgments cited by the Court of First Instance in that connection do refer to the rules of procedure of a Community institution, in none of those cases was an infringement of the relevant rules of procedure raised by the applicant and reviewed by the Court of Justice.

In paragraph 77 of the PVC judgment, the Court of First Instance refers to a considerable number of judgments of the Court of Justice in staff cases but also in 'other areas of Community law' and claims that:

'[according to] a consistent line of decisions of the Court of Justice ... it is admissible for natural and legal persons to plead an infringement of the Rules of Procedure of a Community institution in support of their claims against a measure adopted by that institution (see in that regard the numerous judgments concerning Community staff law, in particular Joined Cases 94 and 96/63 *Bernusset* v *Commission* [1964] ECR 297; Case 178/80 *Bellardi-Ricci and Others* v *Commission* [1981] ECR 3187; Case 324/85 *Bouteiller* v *Commission* [1987] ECR 529, as regards solely the Commission's Rules of

119 — PVC judgment, paragraph 78.

Procedure; also see in other areas of Community law: Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333, at paragraph 36; Case 297/86 *CIDA* v *Council* [1988] ECR 3531; Case 200/89 *Funoc* v *Commission* [1990] ECR I -3369).'

52. On scrutinizing the judgments cited by the Court of First Instance, I must to a large extent agree with the Commission's criticism. In none of those cases did an applicant expressly plead an infringement of the rules of procedure of a Community institution. Consequently, in none of them did the Court of Justice have to determine whether there had been an infringement of the relevant rules of procedure and whether the applicant could rely on that infringement. The references made by the Court of Justice in the staff cases cited [120] and in the first two judgments cited 'in other areas of Community law' (the judgments in *Roquette Frères* v *Council* [121] and *CIDA* v *Council* [122]) to rules of procedure of a Community institution are at most *obiter dicta*.

Only in the last judgment cited, *Funoc* v *Commission*, did the Court base its legal assessment partly on the Commission's Rules of Procedure. The applicant claimed that a Commission decision requesting the reimbursement of money and refusing to pay the balance in respect of a project of the

120 — Only the judgments in *Bernusset* and *Bouteiller* incidentally mention the Commission's Rules of Procedure. There is no mention of them at all in the judgment in *Bellardi Ricci*. In the judgment in *Bernusset*, the Court of Justice runs over the procedure which the Commission followed in Case 94/63 in taking the contested appointment decision (namely the written procedure provided for in Article 11 of the Rules of Procedure) but only in the context of the question whether the safeguards laid down by Article 45 of the Staff Regulations of Officials of the EEC for the benefit of officials eligible for promotion has been complied with: *Bernusset* [1964] ECR 297, at 310. In other words, the Court mentioned the Rules of Procedure only in the context of the examination of the *facts*. Also in the judgment in *Bouteiller*, the Court refers only very incidentally to the 'Rules of Procedure' of the Commission, without specifying the provision in question (it appears from the Opinion of Advocate General Da Cruz Vilaça that Article 26 of the Rules of Procedure was the provision concerned). What was at issue in that case was the taking into account, in the context of a promotion procedure, of a specific factor in an official's career, namely his having temporarily assumed the duties of head of a newly set up department. He had been assigned those temporary duties under Article 26 of the Rules of Procedure, which provides for the provisional replacement of a Head of Division who is prevented from acting by the senior official in the highest grade.

121 — This case was concerned with an action brought by a French company to annul a Council agricultural regulation laying down a production quota for isoglucose. The European Parliament intervened in the proceedings in support of the applicant's claims of infringement of essential procedural requirements. The applicant at no time invoked any provision of the rules of procedure of any Community institution. In paragraph 36 of the judgment in *Roquette Frères* v *Council*, which is cited by the Court of First Instance, the Court of Justice examined whether the Council, in adopting the contested regulation, had consulted the Parliament in accordance with Article 43(2) of the EEC Treaty. It merely mentioned in that regard that the Council had neglected to request the application of the emergency procedure provided for by the Rules of Procedure of the Parliament (it appears from the Opinion of Advocate General Reischl that the relevant provision of the Parliament's Rules of Procedure was Article 14). Cf. the almost identical pronouncement made by the Court on the same day in Case 139/79 *Maizena* v *Council* [1980] ECR 3393, at paragraph 37. Later the Court was to refer to that passage in *Roquette Frères* in its judgment of 10 July 1986 in Case 149/85 *Wybot* v *Faure* [1986] ECR 2391, at paragraph 24.

122 — This case was concerned with an action brought by an Italian confederation of company directors and managers for the annulment of a Council decision appointing the members of the Economic and Social Committee. At no time was it claimed that there had been an infringement of the Council's Rules of Procedure: the action was based on infringement of Article 195 of the EEC Treaty and misuse of powers by the Council. The only reference to the Council's Rules of Procedure is in paragraph 25 of the judgment, where the Court observes that Council took the decision under the procedure for items in Part A laid down in its Rules of Procedure (in this case, too, without mentioning which provision of those rules was involved; it was in fact Article 2(6)).

European Social Fund was unlawful on the ground that it was not taken by the competent body (namely the Commission itself), but by the Head of Division of Directorate-General V, who signed the decision. [123] The Court rejected that argument by reference to Article 27 of the Rules of Procedure and the case-law cited above (in section 42) on the grant of authority to sign:

'In this submission, the applicant has failed to acknowledge that, as the Court recognized in its judgment of 14 July 1972 in Case 48/69 (*ICI* v *Commission* [1972] ECR 619, paragraphs 10 to 14) and its judgment of 17 October 1972 in Case 8/72 (*Cementhandelaren* v *Commission* [1972] ECR 977, paragraphs 10 to 14), delegation of signature is the normal means whereby the Commission exercises its powers. The applicant has not provided any evidence to support the view that the Community administration disregarded the relevant rules in this case.' [124]

I shall be presently returning to discusss the significance of this judgment as regards the question as to whether the rules of procedure of a Community institution may be pleaded (see section 55 below).

53. It appears from the foregoing that the conclusion to which the Court of First Instance comes in paragraph 77 of the PVC judgment, that there is a consistent line of decisions of the Court of Justice which has held that it is admissible for natural and legal persons to plead an infringement of the rules of procedure of a Community institution, is not supported by the judgments cited to that end. Neither did the Court in those judgments relate the rules of procedure of the Community institution concerned to the principles of legality, legal certainty and sound administration which the Court of First Instance mentions in paragraph 76 of its judgment (see section 58 below).

This does not mean that, apart from the cases cited by the Court of First Instance and the judgment in *Nakajima*, there are no other decisions in which the Court of Justice involved provisions of the rules of procedure of a Community institution or body in its legal reasoning or assessed acts of the institution or body from the point of view of their consistency with the relevant rules of procedure. However, in no such judgment has the Court of Justice expressly stated a view on the legal status of such rules of procedure. What is more, that case-law has no bearing

123 — According to the Report for the Hearing, Funoc did not claim that the Commission's Rules of Procedure had been infringed, but Article 6(1) of Council Regulation (EEC) No 2950/83 of 17 October 1983 (OJ 1983 L 289, p. 1). In its opinion it followed from that provision that the decision should have been taken by the Commission itself.

124 — Judgment in *FUNOC*, paragraph 14.

on disputes between an institution and natural or legal persons *who do not form part of the institution*: invariably the judgments relate to staff cases [125] or to disputes between a Member State and a Community institution. [126] Consequently, it also cannot be inferred from those judgments that the Court of Justice has consistently held that it is admissible for natural and legal persons to plead an infringement of the rules of procedure of a Community institution. However, in my view, the opposite conclusion, to wit that such rules of procedure may in principle not be invoked, cannot be inferred either from the two specific orders cited by the Commission at the hearing. [127]

3. Analysis of the judgment in *Nakajima*

54. All the above reinforces my finding that the only case-law of the Court of Justice which has genuine force of precedent is the judgment in *Nakajima*: only in that case did the Court expressly pronounce upon the legal status of the rules of procedure of a Community institution and upon the question whether an individual natural or legal person outside the institution can plead an infringement of such rules. The respondents' argument at the hearing to the effect that *Nakajima*is irrelevant to the present case does not hold water: although it is correct that that judgment is concerned with the Council's (not the Commission's) Rules of Procedure and has no bearing on the authentication of decisions, it does have the force of precedent with regard to the question presently being considered, namely the legal status of the rules of procedure of a Community institution and whether they may be

125 — See in particular the judgment in Case 298/81 *Colussi* v *Parliament* [1983] ECR 1131, paragraph 10; the judgment in Case 223//82 *De Bruyn* v *Parliament* [1983] ECR 2879, paragraph 18; the judgment in Case 260/80 *Andersen* v *Council* [1984] ECR 177, paragraphs 5 and 6; the judgment in Case 69/83 *Lux* v *Court of Auditors* [1984] ECR 2447, paragraphs 9, 11 and 12 (Rules of Procedure of the Court of Auditors); the judgment in Case 307/85 *Gavanas* v *Economic and Social Committee and Social* [1987] ECR 2435, paragraphs 17 to 21 (Rules of Procedure of the Economic and Social Committee); the judgment in Case 1/87 *Picciolo* v *Commission* [1988] ECR 711, paragraphs 36 to 40 (internal rules of the Publications Office). For staff cases in which the rules of procedure of an institution were discussed more incidentally, see the judgment in Case 3/84 *Patrinos* v *Economic and Social Committee* [1985] ECR 1421, paragraphs 7 and 21, and the judgment in Joined Cases 87/77 and 130/77, 22/83 and 10/84 *Salerno* v *Commission and Council* [1985] ECR 2523, paragraphs 7 and 50 (internal regulation of the European Association for Cooperation).

126 — There is also a considerable amount of variety within this group of judgments. Where the judgment concerns a Member State which, as a member of the institution in question, pleads an infringement of the rules of procedure, the Court has already expressly held that the institution was bound by its rules of procedure and could not deviate from them: see the judgment in Case 68/86 *United Kingdom* v *Council* [1988] ECR 855, paragraph 48; see also the judgment in Case 131/86 *United Kingdom* v *Council*, as discussed above (in section 10 et seq.). In cases where the Member State was not a member of the institution concerned, the Court shows signs of reluctance: thus it repeatedly refused to review, at Member States' request, a resolution of the European Parliament in the light of that institution's rules of procedure on the ground that the resolution'related to the internal organization of its work and could not, therefore, be the subject of judicial review': judgment in Joined Cases 358/85 and 51/86 *France* v *Parliament* [1988] ECR 4821, paragraphs 16 and 17, and judgment in *Luxembourg* v *Parliament*, cited in footnote 17, at paragraphs 43 and 44. Similar reluctance is to be seen in the judgment in Case 278/84 *Germany* v *Commission* [1987] ECR 1, paragraphs 12 and 13.

127 — These are the orders in Case 78/85 *Group of the European Right* v *Parliament* [1986] ECR 1753 and in Case C-68/90 *Yvan Blot and Front National* v *Parliament* [1990] ECR I-2101. In both cases, a member of the Group of the European Right of the European Parliament brought an action for the annulment of internal measures adopted by the Parliament. They claimed *inter alia* that the Parliament's Rules of Procedure had been infringed. In both cases, the Court of Justice decided that the actions were inadmissible on the basis of its judgment in Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, according to which an action for a declaration of nullity will lie only against acts of the European Parliament which are intended to produce legal effects *vis-à-vis* third parties. Neither of the contested acts satisfied that requirement. However, the Court did not discuss whether or not the provisions of the Parliament's Rules of Procedure which were invoked by the parties could be pleaded.

relied on by individuals outside the institution.

55. The question is therefore whether the Court of First Instance correctly interpreted the judgment in *Nakajima* where it distinguished between those provisions of an institution's rules of procedure which are concerned solely with the internal working arrangements of the institution (whose infringement therefore may not be invoked) and those provisions which create rights and are a factor contributing to legal certainty (whose infringement therefore may be invoked).

I consider that a qualified answer must be given. It follows in any event from the Court's case-law that the second situation is rather an exception than the rule: the rules of procedure of a Community institution have the main aim, according to the judgments in *AKZO* and *Nakajima* (see sections 41 and 48, respectively, above), of regulating the internal functioning of the institution *with a view to its sound administration*. This approach applies *a fortiori* to the Commission in view of the imperative set out in Article 16 of the Merger Treaty (quoted in section 48 above). It further clearly follows from the judgment in *Nakajima* that natural or legal persons may not plead an infringement of the provisions of rules of procedure which relate to the organization and decision-making of the institution in question and therefore aim at ensuring that *internal* discussions are soundly conducted — which was clearly the case with the articles of the Council's Rules of Procedure which were relied upon by Nakajima (see section 49 above).

Nevertheless, the Court's case-law does not completely preclude the possibility of individuals' relying on rules of procedure, at least in so far as the provision in question is, in the words used in paragraph 50 of the judgment in *Nakajima*, 'intended to ensure protection for individuals'. An apposite illustration of a provision of the Commission's Rules of Procedure which satisfies that requirement is afforded by Article 27 relating to the delegation of authority. The judgments in *AKZO, VBVB and VBBB* v *Commission* and *Funoc* v *Commission* indicate, implicitly but surely, that, in an appropriate case, a third party may plead an infringement of that provision. [128] Moreover, that is no more than logical: as I stated earlier (in section 38 et seq.) the problem of delegation and the associated power of representation is closely bound up with the principle laid down by the Treaty of the collegiate responsibility of the Commission and with the question whether a measure was adopted or carried out by an authority with the power to do so. The latter question is concerned with competence and is therefore subject to review of legality by the Court under the first paragraph of Article 173 of the EEC Treaty.

128 — See paragraph 14 *in fine* of the judgment in *VBVB and VBBB* v *Commission*, cited in footnote 48, and paragraph 14 *in fine* of the judgment in *Funoc* v *Commission*, as set out in section 52; it appears therefrom that the Court considers it possible for an applicant to provide proof that the rules on delegation or on the grant of the authority to sign were infringed.

56. The example of Article 27 strengthens me in my conviction that the touchstone with regard to the question of invocability must be that a provision of an institution's rules of procedure is also intended *to protect individuals*, and not, or at least not solely, to ensure the sound internal functioning of the institution in question. If it is understood in this sense I can agree with the distinction which the Court of First Instance interprets the judgment in *Nakajima* as embodying. However, that does not yet mean that I wholly endorse the view of the Court of First Instance to the effect that Article 12 of the Commission's Rules of Procedure 'create [s] rights and [is] a factor contributing to legal certainty' for individuals. To that I end I shall now consider the significance of authentication within the meaning of that provision.

B. The legal significance of the authentication of Commission decisions under Article 12 of the Commission's Rules of Procedure

1. The interpretation given by the Court of First Instance

57. I would first run through the main passages of the PVC judgment in which the Court of First Instance sets out its views on the authentication procedure provided for in Article 12 of the Commission's Rules of Procedure. The fundamental standpoint adopted by the Court of First Instance is set out in paragraph 72 of the PVC judgment:

'The procedure for authenticating measures provided for by that provision of the Commission's Rules of Procedure, which derive their legal basis directly from Articles 15 and 16 of the Merger Treaty of 8 April 1965, which in addition provide that the rules are to be published, constitutes an essential factor contributing to legal certainty and stability of legal situations in the Community legislative system. Only that procedure can guarantee that measures issued by an institution have been adopted by the competent authority in accordance with the procedural rules laid down by the Treaty and the provisions adopted in implementation thereof, in particular the requirement to provide a statement of reasons laid down by Article 190 of the Treaty. By guaranteeing the inalterability of the measure adopted, which may be amended or repealed only in accordance with those requirements, it allows those subject to the law, whether they be natural or legal persons, Member States or other Community institutions to know with certainty and at any given time the precise extent of their rights and their obligations and the reasons which led the Commission to adopt a decision with respect to them.'

According to the Court of First Instance, the authentication procedure fulfils more specifically the following functions:

'First, authentication of the measure certifies that it exists and that its terms correspond exactly to those of the measure adopted by the Commission. Secondly, since the measure is dated and bears the signatures of the President and the Secretary General, authentication guarantees the competence of the authority issuing the measure. Thirdly, by rendering the measure enforceable, authenti-

cation ensures that it is fully incorporated into the Community legal order. [129]

The Court of First Instance considers that the formal requirements associated with that authentication are unavoidable:

'All those rigorous formal requirements governing the drawing up, adoption and authentication of measures are necessary in order to guarantee the stability of the legal order and legal certainty for those subject to measures adopted by Community institutions. Such formalism is strictly necessary for the maintenance of a legal system based on the hierarchy of rules. It guarantees observance of the principles of legality, legal certainty and sound administration ... . Any infringement of those rules would create a system that was essentially precarious, in which the description of the persons subject to measures adopted by the institutions, the extent of their rights and obligations and the authority issuing the measures could be known only approximately, thereby jeopardizing the exercise of judicial review. That is why in Case 68/86 *United Kingdom* v *Council* [1988] ECR 855 (the "hormonal substances" case), where, as in the judgment of the same date in the "laying hens" case, it was emphasized that the Rules of Procedure of the Community institutions had binding force, the Court held that "the rules regarding the manner in which the Community institutions arrive at their decisions are laid down in the Treaty and are not at the disposal of the Member States or of the institutions themselves".' [130]

58. In sum, I understand that, according to the Court of First Instance, the authentication procedure provided for in the Commission's Rules of Procedure has the following functions: (i) it provides a guarantee that the measure in question was adopted by the competent authority in accordance with the procedural rules laid down by the EEC Treaty and the provisions adopted in implementation thereof; [131] (ii) it confirms the actual existence and content of the measure and confirms that it corresponds to the intention of the full Commission; [132] and (iii) by rendering the measure enforceable, it ensures that it is incorporated into the Community legal order. [133]

Before considering whether those functions may actually be ascribed to the authentication procedure, I consider it appropriate to examine more closely the relevant provisions of the Commission's Rules of Procedure.

2. Closer analysis of the relevant provisions of the Commission's Rules of Procedure

59. Article 12 forms part of Section I, 'Acts of the Commission', of Chapter I of the

129 — PVC judgment, paragraph 75.

130 — PVC judgment, paragraph 76.

131 — See paragraphs 72 and 75 of the PVC judgment.

132 — PVC judgment, paragraph 74 *in fine* and paragraph 75.

133 — PVC judgment, paragraph 75.

Rules of Procedure. It comes at the end of that section, which deals solely with the way in which the Commission deliberates and takes decisions at meetings or by means of a written procedure. [134] As the Commission argues and the Court of First Instance accepted in its judgment, [135] Article 12 and Article 10 of the Rules of Procedure are closely connected. I shall set out both provisions in full:

'*Article 10*

Minutes shall be taken of all meetings of the Commission.

The draft minutes shall be submitted to the Commission for approval at a subsequent meeting. The approved minutes shall be authenticated by the signature of the President and the countersignature of the Executive Secretary.'

'*Article 12*

Acts adopted by the Commission, at a meeting or by written procedure, shall be authenticated in the language or languages in which they are binding by the signatures of the President and the Executive Secretary.

The texts of such acts shall be annexed to the minutes in which their adoption is recorded.

The President shall, as may be required, notify acts adopted by the Commission to those to whom they are addressed.'

Read together, those provisions mean that, as far as decisions taken by the full Commission are concerned, the Commission must follow the following procedure: (i) in the first place, *minutes* must be taken of every meeting, which have to be approved at a subsequent Commission meeting and then authenticated by the signatures of the President and the Executive Secretary; (ii) next, *decisions* (taken at a meeting or by a written procedure) must be authenticated in the language or languages in which they are binding by the signatures of the President and the Executive Secretary; (iii) the texts of such decisions must be annexed to the minutes of the Commission meeting in which their adoption is recorded; and (iv) as may be

134 — Section II of Chapter I is concerned with the preparation and implementation of acts of the Commission. There is a further Chapter II, 'Administration', relating to the organization of the Commission's administrative departments, and a Chapter III, 'Deputizing and delegation of powers', which contains Article 27, to which reference has been repeatedly made in this Opinion.

135 — See paragraph 74 of the PVC judgment.

required, the President is to notify the decisions to the persons to whom they are addressed. [136]

3. Authentication — a guarantee with regard to the competence of the authority which adopted the decision and its compliance with procedural requirements, in particular the duty to state reasons laid down by Article 190 of the EEC Treaty?

60. I am not convinced that the aforementioned authentication procedure guarantees that a measure was adopted by the competent authority, namely the Commission. Admittedly, authentication proves that the full Commission adopted a particular decision, but it by no means guarantees that the Commission had the proper competence to adopt that decision. [137] Conversely, the fact that the present Rules of Procedure make no provision for authentication of decisions adopted by a person who has been habilitated under Article 27 of the Rules of Procedure to adopt a measure of administration or management does not mean that such decisions have been adopted by an authority lacking the requisite competence. If the Court of First Instance meant that authentication guarantees that a measure was adopted by a habilitated authority *within the Commission*, I consider that the Court's case-law set out above (in section 40 et seq.) with regard to the principle of collegiate responsibility and the requirements for delegation affords sufficient guarantees in that respect to individuals in order to challenge a decision adopted by a Commission Member or official lacking the necessary competence.

No more can I see what additional guarantee authentication affords in order to ensure that the procedural requirements laid down in the EEC Treaty are fulfilled, in particular the duty to state reasons prescribed by Article 190 of the EEC Treaty. As far as compliance with Article 190 is concerned: although it is correct to say that the statement of reasons forms a constitutive part of a Community measure (see section 73 below), according to the case-law of the Court of Justice (cf. section 16 above) in the first place Article 190 lays down a number of requirements with regard to the *substantive* qualities of the statement of reasons for a Commission decision in a competition case. No matter how carefully it may be carried out, a purely *formal* procedure such as authentication within the meaning of Articles 10 and 12 of the Rules of Procedure cannot remedy a statement of reasons which is defective in point of its content having regard to the Court's requirements with regard to the legal protection of the addressees of the decision and judicial review of legality in the context of Article 173 of the EEC Treaty.

136 — I would observe in passing that nowhere in the Rules of Procedure is it expressly required that, where a decision has to be drawn up in several authentic languages, the Commission must adopt it in all those languages *at the meeting*, and even less that it must be signed by all the Members of the Commission who took part in the decision-making. Neither does Article 12 of the Rules of Procedure lay down a strict time-limit for the authentication of decisions in the authentic language or languages. On the contrary, it appears to me to follow from the provision stipulating that such texts must be appended to the minutes approved pursuant to Article 10 — which, contrary to what the Court of First Instance states in paragraph 74 of the PVC judgment, do not have to be approved at the next meeting but 'at a subsequent meeting' — that authentication pursuant to Article 12 may take place within a reasonable time of the adoption of the decision.

137 — If, for example, the Commission were to adopt a decision in a sphere which belonged exclusively to the jurisdiction of the Member States, such decision would, according to the Court of Justice, 'lack all basis in the Community legal order': judgment in Joined Cases 6/69 and 11/69 *Commission* v *France* [1969] ECR 523, paragraph 13. It is self-evident that this position would not be altered by authentication.

4. Articles 191 and 192 of the EEC Treaty more closely considered

61. In order to assess the other functions ascribed by the Court of First Instance to authentication, including the role played by authentication for the purposes of compliance with the other procedural requirements laid down by the EEC Treaty and its implementing rules, I consider that I should first examine the significance of Articles 191 and 192 of the EEC Treaty more closely. The procedural requirements laid down by the EEC Treaty with regard to decisions in competition cases imposing a pecuniary obligation on natural or legal persons are precisely set out in those two articles — as well as in Article 190, which has already been discussed.

62. The second paragraph of Article 191 of the EEC Treaty provides in the first place, that 'decisions shall be notified to those to whom they are addressed'. In other words, *notification* is an essential formality in order for a decision to take effect. [138] Nevertheless, the Court shows signs of flexibility with regard to the *formal* way in which notification must be effected: it has consistently held since the judgment in *Continental Can* that 'a decision is properly notified within the meaning of the Treaty if it reaches the addressee and puts the latter in a position to take cognizance of it'. [139] That case-law is a logical continuation of the judgment in *ALMA* v *High Authority*, where the Court held, on the ground of a 'a principle of law recognized in all countries of the Community', that 'a written declaration of intent becomes effective as soon as it arrives in due course within the control of the addressee'. [140] The decisive test as to whether the notification requirement laid down in Article 191 of the EEC Treaty has been fulfilled is, in other words, whether the addressee has been given *actual access* to the decision in question. [141] As the Court held in the *Geigy* and *ICI* judgments, irregularities in the manner in which a decision was notified do not affect the measure itself and therefore cannot make it invalid: at most such irregularities may in certain circumstances prevent the period within which an application must

138 — Unlike in the case of regulations, the second paragraph of Article 191 of the EEC Treaty does not prescribe that decisions must be *published* in the Official Journal. Consequently, under the EEC Treaty the entry into effect of a decision is not dependent on such publication: cf. the judgment in *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission*, cited in footnote 47, at paragraph 28. In the case of a number of Commission decisions relating to Articles 85 and 86 of the EEC Treaty, publication is required under Article 21 of Regulation No 17; however, that publication requirement does not apply to decisions in which fines are imposed under Article 15 of Regulation No 17 on account of infringement of Article 85 or Article 86. Nevertheless, according to the Court, neither the letter nor the spirit of Article 21 of Regulation No 17 prevent the Commission from publishing provided that this does not amount to divulging the business secrets of the undertakings in question; such publication may even 'contribute to ensuring the observance of the rules of the Treaty on competition': judgment in *ACF Chemiefarma* v *Commission*, cited in footnote 51, at paragraphs 102 and 104. Neither may *non-publication* be contested by the addressees of a decision, even though the Court considers that it is 'desirable that a decision ..., affecting the rights and interests of nationals of several Member States, should be brought to the attention of the public, as has been the practice in similar cases': judgment in Joined Cases 73 and 74/63 *Handelsvereniging Rotterdam* v *Minister van Landbouw* [1964] ECR 1, more specifically at 24.

139 — Judgment in *Europemballage and Continental Can* v *Commission*, cited in footnote 75, at paragraph 10. In that case, the Court held that the decision had been properly notified because it actually reached Continental (by means of letters sent through the post). See, for more recent confirmation of this case-law, in particular the judgment in *Cockerill-Sambre* v *Commission*, cited in footnote 13, at paragraph 10, and the judgment in Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 6; see also the judgment of the Court of First Instance in Case T-12/90 *Bayer* v *Commission* [1991] ECR II-219, paragraph 18.

140 — Judgment in *ALMA* v *High Authority*, cited in footnote 15, at 99.

141 — Consequently, the Court also held in the *Continental Can* judgment that Continental Can could not make use of its own refusal to take cognizance of the communication made to it in order to render the communication ineffective: judgment in *Europemballage and Continental Can* v *Commission*, cited in footnote 75, at paragraph 10.

be lodged from starting to run. [142] The Court is watchful, though, of correct compliance with the rules on the use of languages laid down in Article 3 of Regulation No 1, on the ground that 'Community institutions are under a duty to send an undertaking to which a decision is addressed a copy of that decision in the language of the Member State to which this undertaking belongs'. [143] However, according to the Court, the fact that the Commission also sent the undertaking copies of the decision in other languages is not such as to call into question the validity of the decision. [144]

The second paragraph of Article 191 goes on to provide that decisions 'shall take *effect* upon such notification'. Consequently, before it is notified, a decision cannot enter into force: the Court has affirmed that it is a fundamental principle in the Community legal order that a measure adopted by the public authorities shall not be applicable to those concerned before they have had an opportunity to make themselves acquainted with it. [145] This is also clear from the fact that the period for bringing proceedings for a declaration of nullity under Article 173 of the EEC Treaty does not begin to run until the measure has been notified to the applicant or, in the absence thereof, until the day on which it came to the applicant's knowledge (third paragraph of Article 173 of the EEC Treaty).

In the judgment in *Consten and Grundig*, the Court expressly held with regard to a decision based on Article 85 of the EEC Treaty that 'only the text which is notified to the addressees is authentic'. [146] Consequently, the addressee cannot rely upon a mistake in the text published in the Official Journal. [147]

63. Article 192 of the EEC Treaty governs the *enforceable nature* of decisions (also, according to Article 187 of the EEC Treaty, of judgments of the Court) which impose a pecuniary obligation on natural or legal persons, such as in 'Article 85' cases. Such decisions are enforceable vis-a-vis such persons (first paragraph of Article 192). The order for their enforcement must be appended to the decision by the national authority designated for this purpose by the Government of each Member State 'without other formality than verification of the authenticity of the decision'(second paragraph of Article 192). [148] It is assumed that the verification

142 — Judgments cited in footnote 75, *ICI* v *Commission*, at paragraphs 39 and 40, and *Geigy* v *Commission*, at paragraph 18. As far as both ICI and Geigy were concerned, the Court held that they had had full knowledge of the text of the decision and had exercised their right to institute proceedings within the prescribed period. The Court observed that in those circumstances they had no interest in pleading irregularities concerning notification. The plea was therefore declared inadmissible: judgment in *ICI* v *Commission*, paragraphs 42, 43 and 44; judgment in *Geigy* v *Commission*, paragraph 19.

143 — Judgment in *Suiker Unie* v *Commission*, cited in footnote 54, at paragraph 114. For the text of this provision, see footnote 64.

144 — Judgment in *Suiker Unie* v *Commission*, paragraph 115.

145 — Judgment in Case 98/78 *Racke* v *Hauptzollamt Mainz* [1979] ECR 69, paragraph 15 *in fine*. See also in that connection H.-W. Daig and G. Schmidt, 'Artikel 191', in Von der Groeben-Thiesing-Ehlermann, *Kommentar zum EWG-Vertrag*, IV, p. 4991, No 20; E. Grabitz, 'Artikel 191', in Grabitz *Kommentar zum EWG-Vertrag*, p. 32, No 8.

146 — Judgment in *Consten and Grundig* v *Commission*, cited in footnote 49, at 337.

147 — Ibid. Consten alleged infringement of essential procedural requirements on the ground that the text published in the Official Journal was described as a directive.

148 — For a survey of the competent authorities designated by the Member States, see J.-V. Louis, 'Article 192', in *Le droit de la Communauté économique européenne (Commentaire Mégret)*, Part 10, pp. 516 and 517, footnote 5.

entails only that the competent national authority determines whether the measure to be enforced *actually* emanates from the Community institution which notified the decision. [149]

5. Assessment of the other functions ascribed by the Court of First Instance to authentication in the light of these articles of the Treaty

64. If I assess in the light of Articles 191 and 192 of the EEC Treaty the other functions which the Court of First Instance regards as attaching to the authentication procedures provided for in the Commission's Rules of Procedure, I am bound to find straight away that the function of *rendering a Commission decision enforceable and ensuring that it is incorporated into the Community legal order* does not stand up. In this connection the Court of First Instance wrongly ignored completely the second paragraph of Article 191 of the EEC Treaty and the case-law developed by the Court of Justice on the basis of that article, and Article 192 of the EEC Treaty, which alone lay down the conditions under which a decision takes effect and by which it forms a part of the Community legal order and becomes enforceable. Before it is notified in accordance with those provisions, a decision cannot enter into force and cannot be enforceable, notwithstanding compliance with the internal authentication procedure.

65. I am also unable to see in the light of Articles 191 and 192 of the EEC Treaty how authentication in accordance with Articles 10 and 12 of the Commission's Rules of Procedure affords vis-à-vis persons to whom the decision is addressed any additional guarantee as to the *actual existence and content of the measure*. According to the Court's case-law, where a Commission decision is notified to a natural or legal person in accordance with the second paragraph of Article 191 of the EEC Treaty, the notified measure alone is authentic and can have its authenticity verified by the national authorities, with a view to appending the order for enforcement (see sections 62 and 63 above). At that point the Commission is no longer entitled — unless the measure should appear non-existent (see section 77 below) — to withdraw the declaration of intent which it has expressed. That would conflict with the principles of legal certainty and of the protection of the legitimate expectations of the addressee, who can assume that the measure is lawful. [150] Only if a measure is unlawful may the Commission withdraw it, yet, according to the established case-law, even in such an event only 'provided that the withdrawal occurs within a reasonable time and provided that the Commission has had sufficient regard to how far the applicant might have been led to rely on the lawfulness of the measure'. [151]

149 — E. Grabitz, 'Artikel 192', in Grabitz *Kommentar zum EWG-Vertrag*, p. 36, No 11; H. P. Ipsen, *Europäisches Gemeinschaftsrecht*, Tübingen, Mohr, 1972, p. 535, No 13.

150 — See the judgment in Case 15/85 *Consorzio Cooperative d'Abruzzo* v *Commission* [1987] ECR 1005, in particular at paragraphs 13 and 17.

151 — Judgment in *Consorzio Cooperative d'Abruzzo* v *Commission*, paragraph 12; judgment in Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749, paragraph 10; see the judgment in Joined Cases 7/56 and 3 to 7/57 *Algera* v *Common Assembly* [1957 and 1958] ECR 39, at 61, as long ago as 12 July 1957; judgment in Case 14/61 *Hoogovens* v *High Authority* [1962] ECR 253, at 272; judgment in Case 111/63 *Lemmerz-Werke* [1965] ECR 677, at 690 and 691.

6. Guarantee that the content of the measure corresponds to the intention of the full Commission?

66. This brings me to the last function of authentication identified by the Court of First Instance, namely guaranteeing that, in point of its content, the authenticated measure corresponds to the measure adopted by the full Commission. In my view, this needs to be qualified as follows.

I would emphasize first of all that the Community Court can only accept a request from an addressee of a Commission decision to the effect that it should order, by way of measure of inquiry, the production of authenticated minutes and of the authenticated original of the decision — both of which are *confidential* documents, since, according to Article 8 of the Commission's Rules of Procedure, the Commission's discussions are confidential — if the party in question shows that it has an *interest*. It is for the Court to assess this interest in the light of the actual circumstances: it may be assumed that the party does have an interest if there are serious indications that the notified version of the decision does not correspond (or no longer corresponds) to the decision reached by the full Commission. [152]

However, it seems to me that such an interest *cannot* be present if there are signs only of discrepancies which, as in the case of adjustments intended to coordinate the various language versions of a decision, do not affect in any respect the purport of the decision, or if there are substantive discrepancies which are capable of affecting only *other* addressees.

However, in the hypothesis that a party gives proof of an interest in the aforementioned sense, I consider that there is indeed a role for the authenticated minutes and authenticated original of a measure adopted by the full Commission. It must indeed be possible for the Community Court to examine in the light of those documents whether amendments were made after the event to the document adopted by the full Commission which do not accord with the Commission's intention as expressed in the documents concerned. I can put this in another way: where the President and Executive Secretary of the Commission sign the approved minutes of a Commission meeting at which a particular decision was adopted and, in addition, sign the [authentic language version(s) of] that decision, I regard this as being a real guarantee for the addressee of the decision that the text which was notified to him actually corresponds to the decision taken by the full Commission. This guarantee operates at two levels. It performs a function *beforehand* (before a decision is notified) within the Commission for the benefit of the Executive Secretary and his departments in the sense that, when they mark the measure to be notified as 'certified' with a view to its notification, they can be sure, as a result of the authentication of the original copy of the

152 — Cf. the order in *BAT and Reynolds* v *Commission*, in which one of the applicants requested the Court to call upon the Commission to submit to it all the documents in the Commission's possession relating to a particular competition file in order to ascertain whether its decision was influenced by factors other than those indicated in the statement of reasons. The President of the Court refused this request, on the ground that this would constitute an 'exceptional measure of inquiry', which 'would presuppose that the circumstances surrounding the decision in question gave rise to *serious doubts* as to the real reasons and, in particular, to suspicions that those reasons were extraneous to the objectives of Community law and hence amounted to a misuse of powers': order in Joined Cases 142 and 156/84 *BAT and Reynolds* v *Commission* [1986] ECR 1899, paragraph 11 (my emphasis).

decision, of the content of the original decision against which they have to determine the faithfulness of the copy to be notified (cf. section 82 below). [153] The guarantee likewise fulfils a function *afterwards* (namely after the decision has been notified) for the Community court for the benefit of the addressee of the decision in the eventuality outlined above, namely where the addressee has serious evidence that the notified text does not correspond to the original.

67. In my view, only the last mentioned function attributed by the Court of First Instance to authentication satisfies the criterion mentioned above (in section 56) which a provision of the rules of procedure of a Community institution must fulfil in order to be able to be pleaded: authentication in accordance with Articles 10 and 12 of the Commission's Rules of Procedure also guarantees — on the authority of the President and Executive Secretary who respectively presided over or attended the meeting at which the decision was taken — that the text notified to an addressee of a Commission decision corresponds to the decision which was adopted by the full Commission. In that respect, authentication aims at better (legal) protection of parties — who, of course, in view of the confidentiality of Commission discussions, cannot themselves check that the version notified so corresponds — and the parties are therefore entitled, in accordance with the judgment in *Nakajima*, to rely on Articles 10 and 12 of the Rules of Procedure.

68. However, the foregoing does not mean that, if in the course of measures of inquiry ordered by the Community Court, it should be established that the Commission did not comply, or did not fully comply, with the authentication procedure provided for in its Rules of Procedure, the addressees of the decision concerned are entitled to plead the infringement of the relevant provisions of the Rules of Procedure as a ground for the *non-existence* of the decision. It will become clear later (in section 77) that in order for this to be so, the decision must be vitiated by obvious defects, that is to say, defects which become apparent, also to its addressees, on reading the text notified to them. This can manifestly not be so where the Court, in the course of a measure of inquiry, finds after the event that the Commission failed to comply with the authentication procedure which takes place within the Commission.

Neither, to my mind, can the Commission's failure to comply, or failure to comply in full, with the aforementioned authentication procedure be regarded as an infringement of an *essential procedural requirement* within the meaning of Article 173 of the EEC Treaty. According to the case-law of the Court of Justice, essential procedural requirements are rules which a Community institution must take into account *before* or *at the time when* it adopts a measure, failing

153 — Under the third paragraph of Article 16 of the Commission's Rules of Procedure, it is the duty of the Executive Secretary to 'take the necessary steps to ensure official notification of acts of the Commission and their publication in the Official Journal of the European Communities'.

which the measure may be declared void. [154] As a result, rules with regard for example to the notice or notification of a measure to the person to whom it is addressed are not considered by the Court to be essential procedural requirements within the meaning of Article 173 of the EEC Treaty: once a decision has been validly adopted, *subsequent* acts cannot affect is validity. [155] I cannot therefore see how the Commission's failure to comply, or precisely to comply, with its internal authentication procedures — which, as appears from my analysis of Articles 10 and 12 (in section 59), necessarily take place after the measure has been approved — can constitute an infringement of an essential procedural requirement.

In contrast, in my view, that authentication should be regarded as a procedural rule which the Commission has imposed upon itself in connection with the obligation imposed on it (by Article 16 of the Merger Treaty: see section 48 above) to perform the tasks conferred upon it by the Treaties in accordance with the *principles of sound administration*. The Court has repeatedly affirmed that those principles apply to action by the Commission in competition cases. [156] Authentication is therefore to be construed as a duty of care imposed by the Commission upon itself which is intended to ensure that the decisions which it takes fully reflect the intention of the full Commission. [157]

69. The foregoing does not prevent a complete failure to comply with the authentication procedure from evidencing such careless administration as to constitute an infringement of the principles of sound administration and hence a ground of unlawfulness within the meaning of Article 173 of the

154 — See W. Waelbroeck, 'Article 173', in *Le droit de la Communauté économique européenne (Commentaire Mégret)*, Part X, p. 128, No 34; see also R. Joliet, *Le droit institutionnel des Communautés européennes. Le contentieux*, Liège, Faculté de Droit, d'Economie et de Sciences sociales de Liège, 1981, p. 99 et seq. The latter distinguishes, on the basis of the Court's case-law, between three groups of essential procedural requirements within the meaning of Article 173 of the EEC Treaty which may result in a measure's being declared void: (i) rules relating to the process whereby Community measures are prepared (for example, the obligation for an institution to consult another institution or body or the obligation for the Commission, under Article 19(1) of Regulation No 17, to give undertakings an opportunity of being heard on the matters to which it has taken objection: see as regards the latter point the very recent judgment of 31 March 1993 in Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C/129/85 *Ahlström and Others* v *Commission* [1993] ECR I-1307); (ii) rules relating to the decision-making procedure (in particular rules relating to quorums, majorities and so on); and (iii) rules relating to the external form in which the measure is drawn up (in particular with regard to the language in which it is drawn up and the statement of reasons). The only instance in which the Court has so far categorized a provision of rules of procedure of a Community institution as an essential procedural requirement is the judgment in Case 68/86 *United Kingdom* v *Council* , cited in footnote 126. In that case, the Court held that the Council had infringed Article 6(1) of its Rules of Procedure (under which recourse to the written procedure is subject to the agreement of all the Members of the Council) (see paragraphs 46 to 49 of the judgment). That provision is, according to the Court, an essential procedural requirement (paragraph 51 of the judgment) and hence falls within the *second* category mentioned by R. Joliet. See also the references to that case in the judgment in Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 3, and in the orders in Case 160/88 R *Fédération européenne de la santé animale and Others* v *Council* [1988] ECR 4121, paragraph 12, in Case 34/88 *Cevap and Others* v *Council* [1988] ECR 6265, paragraph 6, in Case 160/88 *Fédération européenne de la santé animale and Others* v *Council* [1988] ECR 6399, paragraph 4, and in Case 138/88 *Flourez* v *Commission* [1988] ECR 6393, paragraph 4.

155 — Judgment in *IAZ* v *Commission*, cited in footnote 43, at paragraph 16. This is also borne out by the Court's case-law relating to irregularities in notification pursuant to Article 191 of the EEC Treaty: cf. the judgments in *Geigy* v *Commission* and *ICI* v *Commission* cited in footnote 62.

156 — See as long ago as the judgment in *Consten and Grundig*, cited in footnote 49, at 347; judgment in *IAZ* v *Commission*, paragraph 15.

157 — In my opinion, the authentication procedure provided for in Articles 7 and 9 of the Council's Rules of Procedure must be understood in the same way. It consists of the fact that (i) minutes of each meeting are to be drawn up and, when approved, are to be signed by the President and by the Secretary-General; (ii) the texts of acts adopted by the Council are to be signed by the President and by the Secretary-General; and (iii) the relevant texts are to be appended to the minutes.

EEC Treaty. [158] However, in my view it cannot be considered that there was *in this case* such careless or unsound administration. It appears from the findings of fact made by the Court of First Instance that the Commission did not infringe the whole of the authentication procedure laid down in its Rules of Procedure: the *minutes* of the 945th meeting of the full Commission of 21 December 1988 which were produced to the Court of First Instance on 5 December 1991 were in any event authenticated by the signatures of the President and the Executive Secretary of the Commission in accordance with Article 10 of the Rules of Procedure. [159] Those minutes clearly indicate that the full Commission discussed the Decision and further expressly state that the Commission (i) found an infringement of Article 85 of the EEC Treaty, (ii) imposed fines specified in the minutes on the fourteen undertakings concerned, (iii) ordered them to bring the infringements in question to an end and to refrain in the future from any practice which may have similar effect and (iv) adopted the decisions set out in documents C(88) 2497 and C(88) 2498 (namely the draft decisions in English, French and German), including the statement of reasons. Since those minutes exhibit that degree of precision — virtually the whole of the operative part is contained therein, together, by virtue of the reference to the draft decisions, with the statement of reasons for the Decision as well — and they were signed by the President and the Executive Secretary in accordance with Article 10 of the Rules of Procedure, it may be taken that that authentication of the minutes can be treated as the authentication of the Decision itself, in the sense that it is possible to determine from such precise, authenticated minutes whether the decision notified to the addressees corresponded to the decision taken at the meeting. Although I find it highly undesirable that the Commission operated in this way — it should long ago have adapted Article 12 of the Rules of Procedure (which dates from 1963) to suit the pace of its decision-making, which has in the meantime increased sharply — I am unable in this case to find that there has been any infringement of any principle of sound administration, given the existence of precise, authenticated minutes which have essentially taken over the function connected with the authentication of the Decision itself.

7. Conclusion

70. In view of the foregoing I would reach the following conclusion. The authentication procedure set out in Articles 10 and 12 of the Commission's Rules of Procedure does not guarantee either that the authority which adopted a Commission decision acted with authority nor that the procedural requirements laid down in the EEC Treaty, including Article 190 thereof, have been complied with. It is independent of the enforceable nature of the decision and of its taking effect or incorporation into the Community legal order. Neither does authentication protect individuals by confirming the existence of the decision, since, for that purpose, only the authentic text which has been duly adopted and notified to the addressees is decisive. The authentication provided for in the Commission's Rules of Procedure, however, does enable the Community Court, where necessary, that is to say, where a party who can

158 — Namely an 'infringement of this Treaty or of any rule of law relating to its application' within the meaning of that provision. It appears from the judgment in *IAZ v Commission*, cited in footnote 43, at paragraph 15 *in fine*, that a procedural defect (even one not relating to an essential procedural requirement) committed by the Commission can give rise to an infringement of the principles of sound administration vitiating the legality of a decision.

159 — See paragraph 28 of the PVC judgment and the declaration of the Commission's Secretary-General referred to therein.

show a sufficient interest asks it to, to check the text of a decision notified to the addressees against the minutes of the Commission meeting at which the measure was adopted and against the original decision, which two documents together confirm the original expression of the Commission's intention. It is only in that respect that authentication is also intended to protect individuals and non-compliance therewith may be pleaded as an infringement of Community law, in particular infringement of a principle of sound administration. In the present case, this function of authentication was, however, entirely fulfilled owing to the existence of precise, authenticated minutes. In so far as the Court of First Instance took no account of this and regarded Article 12 as a procedural requirement which, if it is not complied with, results in the nullity or even the non-existence of the decision, it attributed too absolute a scope to Article 12 of the Rules of Procedure and therefore infringed Community law.

VII — Misapplication of the doctrine of non-existence?

1. The views of the parties and the reasoning of the Court of First Instance

71. In its last plea, the Commission argues that the Court of First Instance misapplied the doctrine of the non-existence of administrative measures, as it has been developed in the national legal systems of the Member States and in the case-law of the Court of Justice. The Commission maintains in the first place that national law in the Member States recognizes the principle whereby an administrative act benefits from a presumption of regularity. Only in completely exceptional cases where the irregularity is so gross and obvious that anybody could immediately identify the flaws in the measure is the doctrine of non-existence applied in the laws of the Member States. The Court of Justice, too, has applied in its case-law — in particular in the judgment in *Consorzio Cooperative d'Abruzzo* v *Commission* (which I shall refer to as 'the *Consorzio* judgment') — the aforementioned presumption of regularity and only in very exceptional cases (to date only on one occasion) has been prepared to declare a measure non-existent on the basis of its particularly serious and flagrant irregularities which were obvious also to the addressee. In so far as flaws attach to the Decision at issue in this case, they relate, according to the Commission, only to the internal procedure which led to its adoption. It maintains that the Court of First Instance wrongly held on this ground that the Decision was non-existent.

The respondents' argument boils down largely to the claim that the Commission has wrongly interpreted the doctrine of non-existence as laid down *inter alia* in the *Consorzio* judgment. They argue that it is not a requirement that the flaws in the measure should be obvious to the addressee, that is to say, directly apparent. The Commission wrongly bases an argument on the fact that the Court has only once decided that a measure was non-existent: at Community level there is no known case in which procedural rules were infringed on such a large scale as

in the present case, culminating in the non-authentication of the Decision.

72. Allow me to run through the reasoning followed by the Court of First Instance. First, the Court recalls, while citing the relevant Community case-law, that:

'the Community judges, guided by principles derived from national legal systems, will declare non-existent a measure which is vitiated by particularly serious and manifest defects ..... This plea concerns a matter of public interest which may be relied upon by the parties at any time during the proceedings and must be raised by the Court of its own motion.' [160]

The Court of First Instance goes on to infer from the *Consorzio* judgment (see section 75 below) that

'[i]t is necessary to consider whether in this case the contested measure exhibits particularly serious and manifest defects within the meaning of that judgment such as to lead the Court to declare it non-existent'. [161]

The Court of First Instance then sets to work as follows. After finding that the Decision was not authenticated within the meaning of Article 12 of the Commission's Rules of Procedure and recapitulating its findings with regard to the changes made in the text of the Decision and the lack of competence of the authority which adopted it, the Court holds that it is not possible to determine the date, the content and the authority which adopted the Decision.

As far as the *date* is concerned, the Court considers that it is unable

'to date the measures precisely, even though they were adopted on a date close to the expiry of the mandate of the Member of the Commission responsible for matters of competition, to whom, it is established, the Commission granted at least in part such power of adoption. Thus the Court is unable to determine the date, between 21 December 1988 and 16 January 1989, on which the contested measures were actually adopted

160 — PVC judgment, paragraph 68. The Court of First Instance refers, as regards the concept of the non-existence of Community measures, to the judgments of the Court of Justice in Joined Cases 1 and 14/57 *Société des Usines à Tubes de la Sarrev High Authority* [1957 and 1958] ECR 105; Joined Cases 15 to 33, 52, 53, 57 to 109, 116, 117, 123, 132 and 135 to 137/73 *Schots- Kortner and Others* v *Council, Commission and Parliament* [1974] ECR 177; Case 15/85 *Consorzio Cooperative d'Abruzzo* v *Commission*, cited in footnote 150; Case 226/87 *Commission* v *Greece* [1988] ECR 3611; and the judgment of the Court of First Instance in Case T-156/89 *Valverde Mordt* v *Court of Justice* [1991] ECR II-407.

161 — PVC judgment, paragraph 68 *in fine*.

and incorporated into the Community legal order, thereby acquiring binding force.' [162]

Neither is the Court able to ascertain the 'precise and certain' *content* of the measures adopted

'owing to the amendments which were made to them, since the Commission completely disregarded the authentication procedure laid down by Article 12 of its Rules of Procedure; this would have been the only means of distinguishing ... between the intention of the decision-making body and the subsequent amendments made by a person and at a date that are not identifiable.' [163]

Lastly, the Court finds that

'it is unable, as a result of the two defects mentioned above, to identify with certainty the *authority* which adopted the measures in their definitive version, when, first of all, this is a question of public interest and, secondly, the measures have lost, by virtue of the two defects mentioned above, the presumption of legality which [they have] on the face of it.' [164]

Then, in paragraph 96, the Court reaches the following conclusion:

'Where the Court can neither determine with sufficient certainty the precise date from which a measure was capable of producing legal effects and hence of being incorporated into the Community legal order nor, owing to the amendments made to it, ascertain with certainty the precise terms of the statement of reasons which it must contain under Article 190 of the Treaty nor define and verify clearly the extent of the obligations which it imposes on its addressees or the description of those addressees nor identify with certainty the authority which issued the definitive version, and where it is established that the authentication procedure provided for by the Community rules was completely disregarded and that the procedure laid down by the second paragraph of Article 192 cannot be implemented, such a measure cannot be regarded as a decision for the purposes of Article 189 of the Treaty. Such a measure is vitiated by particularly serious and manifest defects rendering it non-existent in law.'

2. The doctrine of non-existence in the case-law of the Court of Justice

73. Did the Court of First Instance thereby correctly apply the doctrine of non-existence as it is developed in the case-law of the Court of Justice? I would first stress that, from way back since the judgment of

162 — PVC judgment, paragraph 93.
163 — PVC judgment, paragraph 94.
164 — PVC judgment, paragraph 95, my emphasis.

12 July 1957 in the *Algera* case, the Court has adopted the following principle:

'The adoption of an administrative measure creates a presumption as to its validity. That validity can be set aside only by means of annulment or withdrawal, in so far as those measures are permissible.' [165]

In the same judgment, the Court emphasized that:

'the unlawful nature of an individual administrative measure entails its complete nullity only in certain circumstances .... Apart from those exceptional cases, the theoretical writing and the case-law of the Member States allow only of voidability and revocability.' [166]

More recently in the *Consorzio* judgment of 26 February 1987, the Court stated its views on the non-existence of administrative measures in the following terms:

'With regard to the argument that the decision ... is non-existent, it is necessary to point out that under Community law, as under the national laws of the various Member States, an administrative measure, even though it may be irregular, is presumed to be valid until it has been properly repealed or withdrawn by the institution which adopted it. If a measure is deemed to be non-existent, the finding may be made, even after the period for instituting proceedings has expired, that the measure has not produced any legal effects. For reasons of legal certainty which are evident, that classification must consequently be restricted under Community law, as under the national legal systems which provide for it, to measures which exhibit particularly serious and manifest defects.' [167]

In recent years, too, the Court of Justice has repeatedly confirmed that it is prepared to apply the doctrine of non-existence

'only if the measure at issue contained such particularly serious and manifest defects that it could be deemed non-existent'. [168]

74. On closer inspection, the Community case-law is marked by great reluctance to declare measures emanating from Community bodies non-existent. I shall run through the five relevant judgments.

165 — Judgment in *Algera* v *Common Assembly*, cited in footnote 151, at 61.

166 — Ibid., at 60 and 61.

167 — Judgment in *Consorzio Cooperative d'Abruzzo* v *Commission*, paragraph 10.

168 — Judgment in Case 226/87 *Commission* v *Greece* cited in footnote 160, at paragraph 16; judgment in Case C-74/91 *Commission* v *Germany* [1992] ECR I-5437, at paragraph 11.

The first, and, to date, still the only, occasion on which the Court of Justice decided to declare a Community administrative measure non-existent was in the judgment of 10 December 1957 in *Société des Usines à Tubes de la Sarre*. [169] The case was concerned with the conduct of the High Authority in supporting investment programmes in the steel industry under Article 54 of the ECSC Treaty. The applicant, a steel producer, had received a letter from the High Authority which it (but not the High Authority) considered to be the opinion provided for in the fourth paragraph of Article 54 of the ECSC Treaty and contested that document before the Court. From its appraisal of the circumstances, the Court concluded that the High Authority had in fact intended to deliver an opinion within the meaning of that provision. However, it found that under the fourth paragraph of Article 54 of the ECSC Treaty the delivery of such an opinion was subject to a number of requirements (it had to be a reasoned one; it had to be notified to the undertaking concerned; it had to be communicated to the government concerned; and the fact that it had been delivered had to be published), and that only one of those requirements, namely notification, had been fulfilled. The Court found in particular that the 'statement of reasons [was] non-existent', since the terms of the letter could not be regarded 'as a statement of the essential findings of fact upon which the legal justification of the measure' depended. [170] The Court concluded from this as follows:

'Several of the conditions laid down by the Treaty have not been fulfilled; although some of them are formal requirements which cannot affect the character or the existence of an act, it is clear that a statement of reasons for an opinion is not only required by Articles 5 and 15 and the fourth paragraph of Article 54 of the Treaty but that it is an essential, indeed constituent element of such an act, with the result that in the absence of a statement of reasons the act cannot exist.' [171]

75. A second case in which the Court was asked to rule on the non-existence of a Community measure was the judgment of 21 February 1974 in *Schots-Kortner and Others* v *Council, Commission and Parliament*. [172] This was a staff case in which a number of female officials, following on from the judgments in *Sabbatini* and *Bauduin*, [173] claimed payment of the expatriation allowance. One of the applicants claimed, in order to avoid her rights lapsing owing to the expiry of the time-limit for bringing an action, that the provision of the Staff Regulations in force at the time — which the Court in the aforementioned judgments had held not to be permissible — under which the female officials in question had been refused payment of the allowance (the version of Article 4(3) of Annex VII in force at that time) was so unlawful that it had to be regarded as if it had never been written or as if it were non-existent. The Court resolutely refused to cat-

169 — Judgment cited in footnote 160.

170 — The only indication of the reasons supporting the view taken by the High Authority in the relevant letter read as follows: 'In the present circumstances the High Authority has no alternative but to reply to your investment statement with an adverse opinion within the meaning of the fourth paragraph of Article 54 of the Treaty'.

171 — Judgment in *Société des Usines à Tubes de la Sarre*, at 112 and 113.

172 — Judgment cited in footnote 160.

173 — Judgments in Case 20/71 *Sabbatini* v *European Parliament* [1972] ECR 345 and in Case 32/71 *Bauduin* v *Commission* [1972] ECR 363. In those judgments the Court held that Article 4(3) of Annex VII to the Staff Regulations created an arbitrary difference of treatment between officials and that therefore the decisions taken in respect of the officials concerned withdrawing their expatriation allowance had to be annulled.

egorize the provision as non-existent, in the following terms:

'the provisions of Article 4(3) of Annex VII to the Staff Regulations cannot be termed "non-existent", originating as it does with the competent authority and taken with due regard to the procedural and formal conditions laid down by the Treaties'. [174]

76. In the *Consorzio* judgment, cited above, the proceedings were concerned with a financial contribution granted by the Commission through the EAGGF (Guidance Section) to an Italian undertaking, Consorzio Cooperative d'Abruzzo. The Consorzio claimed the annulment of a decision of October 1984 reducing the maximum contribution to its project in relation to the amount fixed in a decision of April 1982. The 1984 revocation decision was worded identically to the earlier 1982 decision, except with regard to the amount of the contribution granted, yet it did not refer thereto. The Commission argued in its defence that it never intended to grant a contribution of the size specified in its 1982 decision and that that decision was non-existent. It claimed *inter alia* that there had been two irregularities in drawing up the decision: (i) the internal rules for establishing the maximum contribution available from the EAGGF had been infringed and (ii) the fact that the Commission had granted a contribution of a different amount from that on which the Management Committee had given a favourable opinion, without communicating the measure concerned to the Council as required by the provisions of the basic regulation. [175]

After recalling its views on the non-existence of Community administrative measures (see section 74 above), the Court brushed aside the Commission's defence relating to the non-existence of the 1982 decision:

'Without there being any need even to consider the gravity of the two irregularities alleged by the Commission, it is sufficient to state that neither of them is manifest. Neither irregularity could be detected by reading the decision. The internal rules for establishing the maximum contribution available from the EAGGF under Council Regulation No 355/77 have not been published. Hence, apart from the Commission officials responsible for the proper application of those rules, no one was in a position to ascertain by reading the decision of 7 April 1982 whether or not those rules had been infringed. The same holds true for the irregularity consisting in the discrepancy between the draft decision submitted to the management committee and the decision adopted on 7 April 1982. Accordingly, the decision of 7 April 1982 cannot be classified as non-existent.' [176]

174 — Judgment in *Schots-Kortner*, paragraph 33.

175 — Namely Article 22(3) of Council Regulation (EEC) No 355/77 of 15 February 1977 on common measures to improve the conditions under which agricultural products are processed and marketed, OJ 1977 L 51, p. 1.

176 — *Consorzio* judgment, paragraph 11.

77. The most recent occasion on which a party pleaded before the Court the non-existence of a Community measure was in Case 226/87 *Commission* v *Hellenic Republic*. [177] The case concerned an application by the Commission for a declaration that Greece had failed to fulfil its obligations by failing to take within the prescribed time-limit the measures necessary to comply with a Commission decision adopted under Article 90(3) of the Treaty. [178] Greece argued that the Court should, by way of exception, exercise its power of judicial review in regard to the legality of the contested decision on the ground that it lacked any basis in the Community legal order. By reference to the *Consorzio* judgment, the Court rejected that objection:

'That objection could be upheld only if the measure at issue contained such particularly serious and manifest defects that it could be deemed non-existent .... However, the arguments put forward by the Hellenic Republic contain no precise factor of such a kind as to permit the Commission's decision to be so described. Indeed, it itself considered that the decision of 24 April 1985 was not non-existent when it stated, throughout the pre-litigation stage, that it intended to comply with that decision.' [179]

78. The Court of First Instance, too, — before the judgment which is the subject of the present appeal — once had to consider the non-existence of a measure, namely in the judgment of 27 June 1991 in the case of *Valverde Mordt*. [180] This was a staff case in which a Court official claimed *inter alia* the annulment of an open competition organized by the Court. In response to an objection of inadmissibility raised against him on the ground that his action was out of time, he argued that the competition was not merely open to annulment but automatically void because it had been organized contrary to the provisions of a Council Regulation. The Court held that that argument corresponded in substance to the rule recognized in the case-law of the Court of Justice according to which,

'in exceptional circumstances, a measure may be deemed to be non-existent if it exhibits particularly serious and manifest defects .... For an act to be thus deprived of the presumption of validity which the Treaties attach, for obvious reasons of legal certainty, even to irregular acts of the institutions, the irregularity must be so gross and so obvious that it goes far beyond a "normal" irregularity resulting from an erroneous assessment of the facts or from a breach of the law ... .' [181]

The Court held that an infringement of the regulation referred to by the official — a measure whose scope was limited both with regard to time and to subject-matter and

177 — Cited in footnote 160.

178 — Commission Decision 85/276/EEC of 24 April 1985 concerning the insurance in Greece of public property and loans granted by Greek State-owned banks, OJ 1985 L 152, p. 25.

179 — Judgment in *Commission* v *Greece* cited in footnote 160, at paragraph 16.

180 — For the reference, see footnote 160.

181 — Judgment in *Valverde Mordt*, paragraph 84.

which had been adopted in connection with the accession of Spain and Portugal — was not in any event 'one of the exceptional cases which permit an irregularity to be described as so serious and so flagrant that it renders the act affected by it non-existent'. [182]

79. I consider that it can be inferred from this survey that the Community Court — following, by its own account, the national legal systems — employs the following assessment criteria with regard to the possible non-existence of a Community administrative act. The starting point invariably is that a measure adopted by a Community body is presumed to be legally valid. Even if the measure is irregular or unlawful, that presumption stands until such time as the measure is declared void or withdrawn. It is possible only in exceptional cases to proceed to a declaration that the measure is non-existent: in order for that to be possible, the measure must exhibit such serious and manifest defects as to be obvious, that is to say clearly apparent on reading the measure and, according to the *Consorzio* judgment, not only for the officials of the body which adopted the measure. What underlies this case-law are 'obvious reasons of legal certainty': as Advocate General Trabucchi observed in the *Schots-Kortner* case:

'The consequences of a declaration of nullity in the case of an act having the force of law are so serious, and often not entirely predictable, that extreme caution is called for in the employment of this doctrine in relation to acts laying down regulations, the more so if these have remained in force over a long period.' [183]

Moreover, is it not striking that in the forty years of its existence the Court has applied the doctrine of non-existence only once, that is to say, in the judgment of 10 December *1957* in the case *Société des Usines à Tubes de la Sarre*, and even then it held that only one of the defects found in that judgment was capable of resulting in non-existence, namely the absence of *any* reasoning?

3. Assessment of the PVC judgment in the light of those criteria

80. Is it possible to say that an exceptional situation is involved here, with a measure exhibiting such serious and manifest defects that they were apparent from reading the measure and the measure must lose any presumption of legal validity? I consider that this is manifestly not the case. It appears from the PVC judgment that the *applicants* at first instance originally assumed that the

182 — Judgment in *Valverde Mordt*, paragraph 85.

183 — At page 197.

measure was subject to a presumption of validity: apart from a variety of grounds for declaring the measure void, no plea was developed regarding the non-existence of the measure. [184] It was only during the hearing that, as a result of the documents produced by the Commission, the plea that the measure was non-existent was developed. [185]

Moreover, from the structure of the judgment, it is manifest that the *Court of First Instance* assumed at first that the Decision was at the most liable to be annulled: the measure for the organization of the procedure and the measure of inquiry which it carried out were specifically intended to ascertain whether the complaints made by some of the applicants at first instance with regard to the infringement of essential procedural requirements and lack of competence were well founded. It was not until after it decided in paragraph 65 that the findings of infringement of essential procedural requirements (on account of the changes made to the Decision after its adoption) and of lack of competence on the part of the authority which adopted the Decision 'should entail the annulment of the contested decision' that the Court began to consider the non-existence of the measure, in the course of which it attached decisive importance to the infringement of Article 12 of the Commission's Rules of Procedure, which was first revealed at the hearing. More generally, I find it difficult to accept that, where 96 paragraphs are necessary in order to find that certain defects are 'so serious and so manifest' that they made the relevant measure non-existent in law, the irregularities were clearly apparent to the addressees on *reading* the decision. All of this is in itself a clear indication that, in this case, there can be no question of a decision's being 'prima facie' non-existent.

81. To my mind, it is also clear that the Court of First Instance misapplied the doctrine of non-existence as it is expressed in the Community case-law from the Court's reasoning with regard to the impossibility of determining the date and the content of the Decision and the authority which adopted it. Although the Court of First Instance gave in its assessment the correct weight to those three elements — which are in fact constitutive components of an administrative measure —, I cannot agree, in view of the other parts of my Opinion, on the legal findings which it makes.

As far as the *date* of the Decision is concerned, there is in my view no doubt that it

184 — Cf. paragraph 9 of the PVC judgment, from which it appears that the applicants before the Court of First Instance primarily sought the annulment of the decision adopted against them and, in the alternative, the cancellation or the reduction of the fine imposed upon them by Article 3 of the Decision. In paragraph 30 of its judgment, the Court of First Instance summarizes the pleas put forward at first instance as follows: 'the applicants have put forward essentially three sets of pleas, namely breach of fundamental rights, infringement of essential procedural requirements and inadequate or incorrect appraisal and legal classification of the facts by the Commission with respect to Article 85(1) of the Treaty'.

185 — See paragraph 30 of the PVC judgment.

was 21 December 1988. It is unambiguous from the Court's findings of fact that on that date the full Commission at its 945th meeting adopted the decision of principle that the fourteen undertakings involved in the PVC case had infringed Article 85 of the EEC Treaty, determined the fines to be imposed on them, approved the order that they should bring the infringement to an end and adopted the Decision in English, French and German. [186] It is therefore established that the date of the measure can be determined, at least for the authentic language versions in question. I also consider that dating is not a problem for the Dutch and Italian versions of the Decision: as I argued earlier (in section 43), it cannot be denied that the full Commission gave the Member of the Commission responsible for competition matters only authority to adopt the text in the other official Community languages in accordance with the text adopted in English, French and German. Consequently, the intention contained in those language versions of the Decision dates back to the same discussion and decision-making of 21 December 1988. The date on which the translation and linguistic coordination was completed is completely irrelevant in that connection. Besides, I would recall that, contrary to what the Court of First Instance assumes, a decision does only become part of the Community legal order and enforceable when that decision is notified in accordance with the second paragraph of Article 191 of the EEC Treaty (section 63 above) without that naturally having an effect on the date of the decision itself.

Also the view of the Court of First Instance that the'precise and certain' *content* of the Decision cannot be ascertained does not convince me: although it is correct that the Commission did not apply the internal authentication procedure set out in Article 12 of its Rules of Procedure, to my mind the decision-making body's intention is unambiguously expressed in the minutes of the meeting of 21 December 1988 — which in any event were authenticated in accordance with Article 10 of the Rules of Procedure — in conjunction with the draft decision in English, French and German which was produced by the Commission and certified as authentic. That intention, as appears from the first part of my Opinion, was not altered in any respect by the changes subsequently made to the Decision. Those adjustments, which were either the upshot of linguistic coordination of the texts (changes in the German version) or purely in the nature of clarifications having regard to the context in which they were made (incorporation of a new paragraph in point 27 of the Decision) or to the Decision as a whole (omission of the words '(EMC Group)' after SAV in Article 1 of the operative part), are so limited that they could have had no influence on the respondents' understanding of the criticism made by the Commission of their conduct from the point of view of Article 85 of the EEC Treaty.

All in all, I can therefore see no reason why the Decision, as argued by the Court of First Instance, should have lost the presumption

186 — See paragraph 37 of the PVC judgment.

of legal validity which it *prima facie* enjoys, on account of the two abovementioned 'defects'.

82. This brings me to my last point, namely the lack of competence *ratione temporis* of the Member of the Commission, Mr Sutherland, to notify the Decision to the respondents, which I have already mentioned above (in section 44). According to the Court of First Instance, that complaint of lack of competence, together with the two'defects' discussed in the preceding section, means that it is impossible to identify with certainty the *authority* which adopted the definitive version of the Decision.

Is that irregularity in itself — since I have already dismissed the other two 'defects' — of such a kind to affect the existence or at least the validity of the Decision? I do not think so and my reasons are as follows. In my view, the case-law of the Court of Justice provides a precedent with regard to the question as to whether the fact that the competent Member of the Commission did not sign a decision addressed to undertakings in a competition case constitutes an infringement of an essential procedural requirement. The judgment in question is that in the case of *Dow Chemical Ibérica* v *Commission*, in which the applicant undertakings claimed *inter alia* that the fact that a decision concerning an investigation under Article 14 of Regulation No 17 had not been signed by the decision-making body constituted an infringement of an essential procedural requirement. The Court of Justice rejected that plea in the following terms:

'there is no provision which requires that the copy of the decision notified to the undertaking must be signed by the Member exercising the delegated power. Furthermore, it is common ground that the contested decisions were duly certified as authentic by the Secretary-General of the Commission.' [187]

It is not the proper place here to set out the differences between a decision concerning an inspection and a final decision, such as the one at issue in this case. Suffice it to say that, no less than in the case of decisions concerning investigations, any Community provision imposes on the Commission the requirement that the text of a decision finding an infringement of Article 85 of the EEC Treaty which is *notified* to the addressees should be signed by the competent Member of the Commission. Furthermore, it appears from the documents submitted to the Court that the text of the decision notified to the respondents bore the seal of the Commission and were authenticated by the Secretary-General of the Commission. [188]

187 — Judgment in *Dow Chemical Ibérica* v *Commission*, cited in footnote 95, at paragraph 59. In his Opinion relating to that case, Advocate General Mischo rightly observes that the addressees could not in any circumstances fail to understand that the decisions were decisions of the Commission, particularly since they were certified by the Commission's seal and by the signature of its Secretary-General and were presented to the applicants by Commission officials duly authorized to implement the decisions: [1989] ECR 2875, section 163 at 2903.

188 — In my view, those formalities are intended to authenticate that the notified version corresponds to the original version of the decision which was authenticated in accordance with Article 12 of the Commission's Rules of Procedure by the President and Executive Secretary of the Commission. As argued above (in section 66), the latter authentication is intended to certify that the original version of the decision corresponds to the decision adopted by the full Commission at its meeting.

The fact remains of course that the notified text of the decision also bore at the foot the words 'for the Commission, Peter Sutherland' (without his signature) and was accompanied by a letter from Mr Sutherland dated 5 January 1989 — that is to say, the last day of his mandate — which was signed by him. Nevertheless, I consider that those circumstances are not a sufficient reason for annulling the decision, let alone declaring it non-existent. In the first place, as far as the *letter* dated 5 January 1989 signed by Mr Sutherland is concerned, it is clear — as the Court of First Instance observes [189] — that such a letter forms no part of a decision finding an infringement of Article 85 of the EEC Treaty. The fact that that letter — which in principle was still signed in time — came from Mr Sutherland can therefore have no effect on the validity of the decision communicated with it. Nor, in my view, can the fact that the letter was dated 5 January 1989, whereas the addressees were not notified until February that year, affect the legality of the Decision: the critical factor for assessing whether notification took place in accordance with the second paragraph of Article 191 of the EEC Treaty is not the date of signature of the accompanying letter, but the fact that the *text* of the decision was notified to its addressees and they were enabled to take cognizance of it, that is to say, that they actually had access to it (see section 62 above). None of the parties denies that this happened in this case.

As for the words 'for the Commission, Peter Sutherland, Member of the Commission', I am unable to accept that this constitutes an irregularity affecting the legality of the Decision. Not only are such words not required by the Community legislation, in addition it is clear that, in so far as it can be accepted that those words form part of the Decision itself, they were approved by the full Commission on 21 December 1988: the English, French and German versions of the draft decision adopted by the full Commission all contain those words, doubtless because it was assumed that notification would take place before Mr Sutherland's mandate expired. What is essential, though, in my eyes, is that those words could not have placed the undertakings addressed in any doubt at all as to whether the Decision did in fact emanate from a competent authority: the Decision appeared in every respect to be a decision adopted by the Commission on the date of 21 December 1988, was clearly intended to produce legal effects, was — as all the addressees were aware — adopted as

189 — See paragraph 63 of the PVC judgment.

the culmination of a detailed administrative procedure following discussion by the full Commission and therefore clearly indicated the definitive intention of the Commission with regard to the alleged infringement of Article 85 of the EEC Treaty. [190]

Conclusion

83. In the light of the foregoing, I consider that the Court should decide as follows:

(1) the judgment of the Court of First Instance of 27 February 1992 in Joined Cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89. T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others* v *Commission* is set aside;

(2) the case is referred back to the Court of First Instance with a view to its pronouncing on the pleas raised by the applicants at first instance which were not dealt with in that judgment.

190 — Cf. the judgments in Joined Cases 53 and 54/63 *Lemmerz* [1963] ECR 239, at 248, and in Joined Cases 23, 24 and 52/63 *Henricot* [1963] ECR 217, at 224.